No. 01-488-CSY Title: Timothy Stuart Ring, Petitioner
v.
CAPITAL CASE Arizona

Docketed: Court: Supreme Court of Arizona
September 20, 2001

Entry	Date	Proceedings and Orders
	Sep 14 2001	Application (01A251) to extend the time to file a petition for a writ of certiorari from September 18, 2001 to October 18, 2001, submitted to Justice O'Connor.
	Sep 17 2001	Application (01A251) denied by Justice O'Connor.
	Sep 18 2001	Petition for writ of certiorari filed. (Response due November 5, 2001)
	Oct 22 2001	Order extending time to file response to petition until November 5, 2001.
	Nov 5 2001	Brief of respondent Arizona in opposition filed.
	Nov 8 2001	Reply brief of petitioner Timothy Stuart Ring filed.
	Nov 20 2001	DISTRIBUTED for Conference of December 7, 2001
	Dec 28 2001	REDISTRIBUTED for Conference of January 4, 2002
	Jan 7 2002	REDISTRIBUTED for Conference of January 11, 2002
	Jan 11 2002	Petition GRANTED. Petitioner's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 25, 2002. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 27, 2002. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 15, 2002. Rule 29.2 is suspended in this case. SET FOR ARGUMENT April 22, 2002. **********
	Feb 25 2002	Brief of petitioner Timothy Stuart Ring filed.
	Feb 25 2002	Joint appendix filed.
	Mar 1 2002	CIRCULATED.
	Mar 15 2002	Record filed.
	Mar 26 2002	Brief amicus curiae of Criminal Justice Legal Foundation (TBP) filed.
	Mar 27 2002	Brief of respondent Arizona filed.
	Mar 27 2002	Brief of Arizona Voice for Crime Victims, Inc.,et al. filed.
	Mar 27 2002	Brief amici curiae of Alabama, et al. filed.
	Apr 15 2002	Reply brief of petitioner Timothy Stuart Ring filed.
	Apr 22 2002	ARGUED.

(1)

Supreme Court, U.S.
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No. 01- 01 488 SEP 18 2001

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Walton v. Arizona, 497 U.S. 639 (1990), held that Arizona's capital sentencing statute, which assigns solely to the trial judge the responsibility for making the findings of fact which are necessary to subject a defendant to a death sentence, does not contravene the Sixth Amendment's jury-trial right as made applicable to the States through the Fourteenth Amendment's Due Process Clause.

The question presented is whether *Walton* should be overruled in light of this Court's subsequent holding, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" (*id.* at 490 (internal quotation marks omitted)) violates the defendant's Sixth Amendment right to a jury trial.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	8
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) ... *passim*

Capano v. State, __ A.2d __, __, 2001 WL 980939 (Del. Aug. 10, 2001) 12, 15, 17

Dickens v. Arizona, No. 01-5474 (filed July 23, 2001) 19

Duncan v. Louisiana, 391 U.S. 145 (1968) 18

Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3763 (U.S. May 23, 2001) 10, 11, 13, 15

Hoskins v. Arizona, No. 00-9744 (filed Apr. 30, 2001) 19

Indiana v. Barker, No. 49G05-9308-CF-09544 (Marion, Ind. Superior Court Sep. 10, 2001) ... 12

Jones v. United States, 526 U.S. 227 (1999) 5, 6, 9, 10, 14, 15, 18

McMillan v. Pennsylvania, 477 U.S. 79 (1986) ... 16

Mills v. Moore, 786 So. 2d 532 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001) 12, 15

Page

People v. Kaczmarek, 741 N.E.2d 1131 (Ill. App. 2000) 11, 15

People v. Ochoa, 110 Cal. Rptr. 2d 324 (Cal. 2001) 15

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 15

United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000) 17

United States v. Mendoza, 464 U.S. 154 (1984) ... 14

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000) 17

United States v. Promise, 255 F.3d 150 (4th Cir. 2001) 10, 13, 17

United States v. Rebmann, 226 F.3d 521 (6th Cir. 2000) 16

Walton v. Arizona, 497 U.S. 639 (1990) ..... *passim*

United States Constitution:

Sixth Amendment ..... i, 1, 2, 5, 6, 7, 17, 18

Fourteenth Amendment ..... i, 2, 5, 6

Page

Statutes:

28 U.S.C. § 1257(a) 1

A.R.S. § 13-703 ..... 3, 4

A.R.S. § 13-703(A) 4

A.R.S. § 13-703(B) 3, 4, 8

A.R.S. § 13-703(D) 4

A.R.S. § 13-703(E) 3, 4

A.R.S. § 13-703(F) 3

A.R.S. § 13-703(F)(1) 3

A.R.S. § 13-703(F)(2) 3

A.R.S. § 13-703(F)(3) 3

A.R.S. § 13-703(F)(4) 3

A.R.S. § 13-703(F)(5) 3, 5

A.R.S. § 13-703(F)(6) 3

A.R.S. § 13-703(F)(7) 3

Page

A.R.S. § 13-703(F)(8) 3

A.R.S. § 13-703(F)(9) 3

A.R.S. § 13-703(F)(10) 3

A.R.S. § 13-703(G) 4

A.R.S. § 13-703(G)(1) 4

A.R.S. § 13-703(G)(2) 4

A.R.S. § 13-703(G)(3) 4

A.R.S. § 13-703(G)(4) 4

A.R.S. § 13-703(G)(5) 4

A.R.S. § 13-1105(A)(2) 2

A.R.S. § 13-1105(C) 3

Ala. Code Ann. § 13A-5-43, 13A-5-45, 13A-5-46 (West 2001) 12

Colo. Rev. Stat. Ann. § 16-11-103 (West 2001) ... 12

Del. Code Ann. tit. 11, § 4209 (West 2000) 12

Fla. Stat. Ann. § 921.141 (West 2000) 12

Page

Idaho Code § 19-2515 (West 2001) 12

Ind. Code Ann. § 35-50-2-9 (West 2001) 12

Mont. Code Ann. §§ 46-18-301 – 46-18-306 (West 2001) 12

Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2524 (West 2001) 12

Rule:

Sup. Ct. R. 10(a) 14

Other Authority:

Margery M. Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41 (2001) 13

TABLE OF APPENDICES

	Page
Appendix A — Opinion Of The Supreme Court Of The State Of Arizona Dated June 20, 2001	1a
Appendix B — Special Verdict (Count I) Of The Superior Court Of The State Of Arizona In And For The County Of Maricopa Dated And Filed October 29, 1997	45a
Appendix C — Relevant Statutes	54a

Petitioner, Timothy Stuart Ring, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona in this case.

OPINIONS BELOW

The opinion of the Arizona Supreme Court (Pet. App. 1a-44a) is reported at 25 P.3d 1139 (Ariz. 2001). The judgment of the Superior Court of Maricopa County (Pet. App. 45a-53a), is unreported.

STATEMENT OF JURISDICTION

The judgment of the Arizona Supreme Court was entered on June 20, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law are set forth in the appendix to this petition at Pet. App. 54a-61a.

STATEMENT OF THE CASE

This case presents the question of whether the Sixth Amendment right to a jury determination of facts that increase the available range of punishment for criminal defendants subject to a term of *imprisonment* applies as well to defendants subject to the penalty of *death*. The Supreme Court of Arizona held that it does not, explaining that it was constrained to so hold by this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990).

A. Arizona's Criminal Code defines the crime of first degree murder to include participation in the commission of a robbery "in the course of and in furtherance of" which a person is killed. Arizona Revised Statutes ("A.R.S.") § 13-1105(A)(2). The statutory maximum sentence that may be imposed, based upon the jury's finding of the facts

constituting the crime of first degree murder, is life imprisonment. A.R.S. §§ 13-1105(C), 13-703; Pet. App. at 7a, 8a, 25a-26a.

Arizona's statutes further provide, however, that after the jury returns a verdict of guilt of the crime of first degree murder, the judge must conduct a "separate sentencing hearing" – in the absence of the jury – on the basis of which he or she may find facts increasing the maximum available punishment to a sentence of death. A.R.S. § 13-703(B) ("The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state."); Pet. App. at 7a, 8a, 25a-26a. Specifically, the judge may find that certain facts treated as "aggravating circumstances" are present. A.R.S. § 13-703(E), (F).[1] The judge "shall" impose a sentence of death upon finding one or more of these facts, unless the judge also finds mitigating circumstances "sufficiently substantial

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1. Aggravating facts include (i) that the defendant committed a previous offense (A.R.S. § 13-703(F)(1), (F)(2)), (ii) that the defendant knowingly created a grave risk of death to persons other than the decedent (A.R.S. § 13-703(F)(3)), (iii) that the defendant procured the commission of the offense by payment (A.R.S. § 13-703(F)(4)), (iv) that the defendant committed the offense in expectation of the receipt of anything of pecuniary value (A.R.S. § 13-703(F)(5)), (v) that the defendant committed the offense in an especially heinous, cruel or depraved manner (A.R.S. § 13-703(F)(6)), (vi) that the defendant committed the offense while incarcerated or on parole (A.R.S. § 13-703(F)(7)), (vii) that the defendant has been convicted of other homicides committed during the commission of the offense in question (A.R.S. § 13-703(F)(8)), (viii) that the defendant was an adult at the time of the offense and the victim was under fifteen or over seventy (A.R.S. § 13-703(F)(9)), and (ix) that the victim was an on duty peace officer (A.R.S. § 13-703(F)(10)).

to call for leniency." A.R.S. § 13-703(E).[2] At the conclusion of the "separate sentencing hearing," the judge returns a "special verdict" setting forth factual findings with regard to any aggravating or mitigating facts. A.R.S. § 13-703(D). These findings determine whether the defendant will be sentenced to death. A.R.S. § 13-703(A), (B), (E).

B. Petitioner Timothy Stuart Ring was charged with participating, along with two others, in the robbery of an armored van. Pet. App. at 2a-7a. A jury found Ring guilty of first degree felony murder, based on circumstantial evidence pertaining to his participation in the robbery and the fact that the van's driver had been shot and killed. Pet. App. at 7a. The maximum statutory penalty for which Ring was eligible, on the basis of the jury's finding that he was guilty of this crime, was life imprisonment. A.R.S. § 13-703; Pet. App. at 7a, 8a, 25a-26a.

The judge who presided over Ring's trial then conducted the required nonjury "separate sentencing hearing" to determine whether facts justifying the imposition of the death penalty were present. A.R.S. § 13-703(B); Pet. App. at 7a. An accomplice to the charged crime testified at the hearing, pursuant to a plea bargain arranged after the jury's verdict was received. Pet. App. at 7a-8a. The accomplice – who did not testify at Ring's trial – asserted at the sentencing hearing that Ring led

2. Mitigating circumstances include (i) a significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct (A.R.S. § 13-703(G)(1)), (ii) unusual and substantial duress (A.R.S. § 13-703(G)(2)), (iii) the defendant's relatively minor role in the offense (A.R.S. § 13-703(G)(3)), (iv) the unforeseeability to the defendant of the death (A.R.S. § 13-703(G)(4)), (v) the defendant's age (A.R.S. § 13-703(G)(5)), and any other factors proffered by the defendant or the State "which are relevant in determining whether to impose a sentence less than death" (A.R.S. § 13-703(G)).

the planning of the robbery, shot the armored van's driver, and subsequently asked to be "congratulated" on his shot. Pet. App. at 8a.

After the sentencing hearing, the judge returned his "special verdict." Pet. App. at 45a-53a. The judge found that Ring led the planning of the robbery, Pet. App. at 47a, and that the killing of the armored van's driver was done in the expectation of receiving something of pecuniary value, A.R.S. § 13-703(F)(5); Pet. App. at 48a-49a. Relying on the accomplice's testimony at the sentencing hearing, *see* Pet. App. at 26a, 28a-30a, 47a, 49a-50a, the judge also found that Ring shot and killed the armored van's driver, and that he subsequently asked to be "congratulated" on his shot – establishing (the judge found) that he had acted in a "heinous" and "depraved" manner. Pet. App. at 49a-50a. These judge-made findings rendered Ring eligible for a sentence of death, which the judge then proceeded to impose. Pet. App. at 53a.[3]

C. Ring appealed to the Supreme Court of Arizona, arguing (*inter alia*) that Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendment principles articulated in *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Ring

3. The judge acknowledged that Ring's "minimal criminal record" was a mitigating circumstance weighing against the imposition of the death penalty, but found this factor insufficiently substantial to call for leniency. Pet. App. at 52a-53a. The Arizona Supreme Court rejected the judge's finding of heinousness or depravity, *see* Pet. App. at 29a-33a, but affirmed his finding that the crime was committed for pecuniary gain, *see* Pet. App. at 33a-34a.

argued that these decisions established that a State sentencing scheme that removes from the jury the role of finding facts that increase the prescribed range of penalties to which a criminal defendant is exposed violates the right to a jury trial guaranteed by the Sixth Amendment, as made applicable to the States by the Fourteenth Amendment. Because Arizona's capital sentencing scheme removed from his jury the role of finding the facts necessary to increase the maximum penalty to which he could be exposed from life imprisonment to the penalty of death, Ring argued, the application of the scheme to him violated his Fourteenth Amendment rights. The State countered that *Walton v. Arizona*, 497 U.S. 639 (1990), a pre-*Apprendi* decision holding that Arizona's capital sentencing scheme was constitutional, was "still the controlling authority on point." Pet. App. at 23a.

The Arizona Supreme Court agreed with the State's contention that "neither *Jones* nor *Apprendi* overruled *Walton*," but noted that both cases nevertheless "raise[d] some question about the continued viability of *Walton*." Pet. App. at 23a. In light of what it viewed as "unclear language" in the *Apprendi* and *Jones* decisions, the court proceeded to set forth a "further explication" of the "practical operation of Arizona's death penalty scheme, as applied under the peculiar facts of the present case." Pet. App. at 23a-24a.

The court began by describing the Sixth Amendment standards set forth in *Jones* and *Apprendi*. In *Jones*, the court observed, this Court stated that " 'diminishment of the jury's significance by removing control over facts determining a statutory sentencing range' would violate the Sixth Amendment." Pet. App. at 24a (*quoting Jones*, 526 U.S. at

248). Likewise in *Apprendi*, the court noted, this Court held that " 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " Pet. App. at 24a (*quoting Apprendi*, 530 U.S. at 490).

The court then noted that the *Apprendi* majority's rationale for concluding that these Sixth Amendment principles would not invalidate "a capital sentencing scheme like Arizona's" was that Arizona's scheme "merely 'requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' " and does not " 'permit[] a judge to determine the existence of a factor which makes a crime a capital offense.' " Pet. App. at 24a (*quoting Apprendi*, 530 U.S. at 496-97). The court observed that Justice O'Connor, in her dissent in *Apprendi*, found the majority's distinction of *Walton* " 'baffling, to say the least,' " insofar as its premise – that in Arizona " 'the jury makes all of the findings necessary to expose the defendant to a death sentence' " – was " 'demonstrably untrue.' " Pet. App. at 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)).

The court then confirmed that Arizona's capital sentencing scheme, as exemplified in Ring's case, was "precisely as described in Justice O'Connor's dissent—[Ring's] death sentence required the judge's factual findings." Pet. App. at 26a. The court explained that under Arizona law, "[t]he range of punishment allowed by law on the basis of the verdict alone" is life imprisonment, and that "[i]t is only after a subsequent adversarial sentencing hearing,

at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." Pet. App. at 25a (citing A.R.S. § 13-703(B)); *see also* Pet. App. at 26a ("when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present").

Having offered this "explication" (Pet. App. at 24a) of Arizona's capital sentencing scheme, the court again acknowledged that this Court has thus far refrained from overruling *Walton*. Pet. App. at 26a. The court observed that it was therefore bound to "conclude that *Walton* is still the controlling authority," and accordingly was required to reject Ring's constitutional challenge to Arizona's scheme. Pet. App. at 27a.[4]

REASONS FOR GRANTING THE WRIT

This Court's recent decisions place the continued viability of *Walton* in grave doubt. A number of State and federal courts have echoed Justice O'Connor's *Apprendi* dissent in noting the irreconcilability of *Walton* and *Apprendi*, but have felt bound to follow *Walton* until this Court revisits it. There can be no serious question that this

4. One Justice declined to join this portion of the court's opinion. Pet. App. at 41a-43a (Martone, J., concurring in the judgment). He stated that the majority was wrong "to question *Walton*" (Pet. App. at 41a) because Arizona's capital sentencing statute authorized the penalty of death on the basis of the jury's verdict "in a formal sense" (Pet. App. at 42a), and thus was consistent with the principles underlying *Apprendi*.

issue, which goes to the constitutionality of the capital sentencing schemes currently in place in nine States, is one of substantial public importance. Nor can it be suggested that any purpose would be served by deferring consideration of the question squarely presented here for a future Term, since the question of whether *Walton* must be overruled cannot "percolate" in, or become the subject of conflicts among, State and federal courts that are duty-bound to apply *Walton* until this Court overrules it. *Walton* must and should be reexamined promptly, and the present case is an appropriate vehicle for this reexamination to be undertaken.

1. Every member of this Court has either authored or joined opinions that state or suggest that *Walton*'s holding is undermined by this Court's more recent decisions,[5] suggest that *Walton* should be reconsidered in light of the principles articulated in these decisions,[6] or note that *Walton* was based on the rationale that Arizona's capital sentencing statute does

5. *Apprendi*, 530 U.S. at 538 (O'Connor, J., joined by Rehnquist, C.J., Kennedy, and Breyer, JJ., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today"); *Jones*, 526 U.S. at 272 (Kennedy, J., joined by Rehnquist, C.J., O'Connor, and Breyer, JJ., dissenting) (stating that the constitutional rule identified in *Jones* and subsequently adopted in *Apprendi* cast doubt on the continued viability of *Walton*, and noting that *Walton* was "a better candidate" than *Jones* itself for the application of that rule).

6. *See Apprendi*, 530 U.S. at 523 (Thomas, J., concurring) (stating that *Walton*'s continued viability in light of the constitutional mandate recognized by Justice Thomas in joining the *Apprendi* majority was "a question for another day"); *Jones*, 526 U.S. at 253 (Stevens, J., concurring) (stating that *Walton* should be reconsidered "in due course" in light of the constitutional principles identified in *Jones* and subsequently adopted in *Apprendi*).

not authorize the judge to make findings of fact that increase the maximum sentence to which a defendant is exposed[7] – a rationale that the Arizona Supreme Court has now authoritatively rejected. *See* Pet. App. at 25a ("[t]he range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release"); *id.* at 26a ("the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present"); *id.* at 26a ("[Ring's] death sentence required the judge's factual findings").

Furthermore, a number of State and federal courts, including the Arizona Supreme Court in this case, have noted the irreconcilability of *Walton* and *Apprendi*. Pet. App. at 23a ("While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*"); *United States v. Promise*, 255 F.3d 150, 159-60 (4th Cir. 2001) (en banc) (characterizing the continued authority of *Walton* in light of *Apprendi* as "perplexing, if not 'baffling' " and a "conundrum") (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3763 (U.S. May 23, 2001) (No. 00-1775) (noting

7. *Jones*, 526 U.S. at 251 (opinion for the Court authored by Souter, J., and joined by Stevens, Scalia, Thomas, and Ginsburg, JJ.) (to distinguish *Walton*, majority undertakes a "careful reading of *Walton*'s rationale," finding that the *Walton* majority "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available").

that *Apprendi* "may raise some doubt about *Walton*"); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. 2000) ("while it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here"). Indeed, one federal circuit judge found this irreconcilability so intolerable that he refused to consider *Walton* authoritative, reasoning that the *Apprendi* Court failed to articulate a "majority position about the continued viability of *Walton*." *Hoffman*, 236 F.3d at 547 (Pregerson, J., concurring separately).

It is plain that the continued viability of *Walton* is in grave doubt, and that this doubt will persist and intensify until this Court reexamines that decision. Such doubts about the viability of one of this Court's precedents might be tolerable if it pertained to a relatively unimportant question, or one as to which a prompt resolution was not necessary, but the question presented here emphatically does not fall in these categories.

2. The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, it involves the precise issue that this Court identified as "of importance generally in the administration of the death penalty" when it determined to grant certiorari in *Walton* itself. *Walton*, 497 U.S. at 647. Moreover, the question of *Walton*'s continued viability directly governs the constitutionality of the capital sentencing schemes in effect not only in Arizona, but also in

Montana,[8] Idaho,[9] Nebraska,[10] Colorado,[11] Florida,[12] Alabama,[13] Indiana,[14] and Delaware.[15]

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8. Mont. Code Ann. §§ 46-18-301 – 46-18-306 (West 2001) (death sentence may be imposed if judge finds one or more aggravating circumstances after sentencing hearing held before judge alone).

9. Idaho Code § 19-2515 (West 2001) (same).

10. Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2524 (West 2001) (death sentence may be imposed if either trial judge, or panel of three judges, finds sufficient aggravating circumstances after sentencing proceeding held before judge or panel alone).

11. Colo. Rev. Stat. Ann. § 16-11-103 (West 2001) (sentence of death may be imposed if panel of three judges finds at least one aggravating factor after sentencing hearing held before panel alone).

12. Fla. Stat. Ann. § 921.141 (West 2000) (sentence of death may be imposed if judge finds, after receiving advisory jury recommendation, sufficient aggravating circumstances); *see Mills v. Moore*, 786 So. 2d 532, 537 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001) ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either").

13. Ala. Code Ann. § 13A-5-43, 13A-5-45, 13A-5-46 (West 2001) (same).

14. Ind. Code Ann. § 35-50-2-9 (West 2001) (same); *cf. Indiana v. Barker*, No. 49G05-9308-CF-09544 (Marion, Ind. Superior Court Sep. 10, 2001) (holding, without citation to *Walton*, that Indiana's capital sentencing scheme violates the constitutional principles announced in *Apprendi*).

15. Del. Code Ann. tit. 11, § 4209 (West 2000) (same); *see Capano v. State*, __ A.2d __, __, 2001 WL 980939, at *72 (Del. Aug. 10, 2001) (noting that by distinguishing *Walton*, the *Apprendi* majority left intact the line of precedent holding constitutional "death penalty statutes like that in Delaware").

3. A reexamination of *Walton* should be undertaken promptly. Putting off the resolution of this important question for a future Term would unnecessarily extenuate the burdens of doubt and lack of guidance that the tenuousness of *Walton*'s continued viability imposes upon legislatures, courts, and capital defendants.

As long as *Walton* remains unexamined by this Court, every death sentence imposed, and every death sentence carried out, pursuant to the capital sentencing schemes of Arizona, the eight other States enumerated above, and any other States that may determine to implement similar schemes, will be under a heavy cloud of constitutional doubt. And during this period of uncertainty all of the State and federal legislatures will be deprived of crucial guidance in determining whether and how to modify their capital sentencing statutes. *Cf.* Margery M. Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 101 (2001) (noting that a "period of uncertainty" will endure until the Court revisits *Walton*). State and federal courts will be burdened as well, in that they will continue to face the daunting tasks of trying to reconcile fundamentally irreconcilable decisions, and of trying to discern principled and coherent boundaries between the spheres in which each of these precedents should govern. *Cf. Promise*, 255 F.3d at 160 ("It is for the Supreme Court . . . to resolve this conundrum"); *Hoffman*, 236 F.3d at 542-47 (panel split with regard to continued viability of *Walton*).

Until *Walton* is reexamined, moreover, an irrational disjunction between the constitutional legitimacy of judge-made factual findings affecting the length of a defendant's *imprisonment*, as compared to the legitimacy of such findings

affecting the decision to impose a sentence of *death*, will be allowed to persist. *See Apprendi*, 530 U.S. at 537 (O'Connor, J., dissenting) ("If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed"); *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting) ("If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death"); Brief of the United States in *Apprendi v. New Jersey*, No. 99-478, 2000 WL 194804, at *24 (Feb. 14, 2000) ("It would be a strange constitutional regime that permitted [judges to make findings essential before a defendant may be sentenced to death], yet precluded a legislature from specifying a statutory enhancement factor that raised the sentencing range available to a judge in imposing a term of imprisonment"). Arbitrary or unreasonable legal distinctions are no more tolerable when found in this Court's decisional law than they are when present in statutes enacted by legislatures. Indeed, they may be less so, insofar as citizens are powerless to use democratic processes to remove them.

None of the factors that sometimes counsel hesitation in the granting of certiorari are present here to counterbalance these weighty concerns. This is not a case in which the Court can wait for the issue to "percolate" or for a conflict to develop. *United States v. Mendoza*, 464 U.S. 154, 160 (1984); Sup. Ct. R. 10(a). This Court has directed the State and federal courts to refrain from treating one of its precedents as implicitly overruled by its subsequent decisions, however

thoroughly the precedent may have been undermined by the Court's more recent decisions. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Courts have obeyed this directive, continuing to treat *Walton* as authoritatively establishing the constitutionality of State capital sentencing schemes in which judges are required to find specific aggravating factors before imposing a sentence of death. *See* Pet. App. at 26a-27a; *Hoffman*, 236 F.3d at 542; *Capano v. State*, __ A.2d __, __, 2001 WL 980939, at *72 (Del. Aug. 10, 2001); *Mills v. Moore*, 786 So. 2d 532, 537 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001); *People v. Ochoa*, 110 Cal. Rptr. 2d 324, 361 (Cal. 2001); *Kaczmarek*, 741 N.E.2d at 1142. Because State and inferior federal courts must continue to "leav[e] to this Court the prerogative of overruling its own decisions" (*Rodriguez de Quijas*, 490 U.S. at 484), no percolation or conflict is possible.

4. The doubts that the members of this Court and other courts have articulated with regard to *Walton*'s continued viability provide a sufficient basis for granting certiorari. But it is worthwhile to note as well that these doubts are well-justified.

Apprendi held that with the exception of the fact of prior conviction, every *finding of fact* that raises the maximum punishment to which a defendant may be subjected must be made by a jury. *See Apprendi*, 530 U.S. at 490 (with the exception of the fact of prior conviction, "we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of *facts that increase the prescribed range of penalties to which a criminal defendant is exposed*' ") (*quoting Jones*, 526 U.S. at 252-53 (opinion of Stevens, J.)) (emphasis added); accord *id.* at 482-83

(noting the "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone").[16] *See also United States v. Rebmann*, 226 F.3d 521, 524 (6th Cir. 2000) ("Our duty, in light of this clear dictate from the Court [in *Apprendi*], is

16. *See also id.* at 482 n.9 (rejecting dissenters' reliance on precedent that did not suggest that a judge may impose "a more severe sentence than the maximum authorized by the *facts found by the jury*" (emphasis added), and quoting a passage from a book stating that the judge may not exceed "*the statutory maximum*" as recognizing "precisely this same limitation"); *id.* at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the *facts* alleged in the indictment and *found by the jury*") (emphases added); *id.* at 476 (describing the portion of New Jersey's hate crime law that provided for an increased maximum sentence on the basis of the defendant's *motive* for selecting his victims as identifying a separate "act[]" being singled out for punishment, regardless of the State's labeling it as a " 'sentence enhancement' "); *id.* at 480 (noting that the traditional common law practice required that, when the *circumstances* under which a criminal act was committed authorized a higher punishment, those circumstances were required to be included in the indictment as elements of the offense charged); *id.* at 487 n.13 (limiting the holding of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), to cases that do not involve the imposition of a sentence more severe than the "statutory maximum for *the offense established by the jury's verdict*") (emphasis added); *id.* at 489 n.15 (noting that at common law the indictment was required to contain "an allegation of *every fact which is legally essential to the punishment to be inflicted*") (emphasis added, internal quotation marks omitted); *id.* at 490 n.16 (distinguishing mitigating facts on the ground that they do not give rise to deprivations of liberty or stigma exceeding the deprivations "authorized by the jury verdict according to statute" and those that "accompany[] the jury verdict alone").

to examine whether the sentencing factor in this case was a factual determination, and whether that determination increased the maximum penalty for the crime charged in the indictment"); *United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) ("*Apprendi* makes clear that the 'prescribed statutory maximum' refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury"); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000) ("A fact, other than prior conviction, that increases the maximum punishment for an offense is the 'functional equivalent of an element of a greater offense than the one covered by the jury's verdict' ") (*quoting Apprendi*, 530 U.S. at 494 n.19).[17]

The Arizona Supreme Court has now authoritatively established that Arizona's capital sentencing scheme contravenes this Sixth Amendment mandate. The court made plain that, like the statute struck down in *Apprendi*, Arizona's capital sentencing scheme provides that the maximum

17. *But see Capano*, __ A.2d at __ & n.509, 2001 WL 980939, at *72 & *82 n.509 (construing *Apprendi* as requiring only that the defendant have notice that the crime charged may result in the imposition of a certain maximum penalty, and not that the jury make all findings of fact necessary to imposition of that maximum penalty); *Promise*, 255 F.2d at 181, 168-82 (Luttig, J., concurring in the judgment) (acknowledging that the "tenor," "overarching principles," and "much of the . . . critical language" of *Apprendi* "unmistakably" require that all facts that increase a defendant's sentence must be proven to the jury beyond a reasonable doubt, but arguing that the holding of *Apprendi* can be construed more narrowly); Pet. App. at 41a-43a (Martone, J., concurring in the judgment) (arguing that *Apprendi* does not bar a judge from finding the facts necessary to the imposition of a sentence of death as long as the statute defining the crime "authorizes the maximum penalty of death in a formal sense").

penalty to which a criminal defendant is exposed may be increased on the basis of factual findings made unilaterally by a judge. Indeed, in light of the court's opinion, the primary distinction remaining between *Apprendi* and the instant case is that in *Apprendi* the Sixth Amendment issue pertained to a ten-year increment in the defendant's prospective prison sentence, whereas here the Sixth Amendment question is literally one of life or death. If anything, the "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge" that underlies the Sixth Amendment's jury trial right is *more* pronounced, not less so, when the judge's factual findings determine whether the defendant will live or die. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

Although it nevertheless was constrained to apply *Walton* in light of its continued authority, the court made plain that *Walton* rests on a mistaken construction of Arizona law. Indeed, the Arizona Supreme Court's opinion appears to have been designed specifically to give this Court an authoritative statement of Arizona law it that may use in reconsidering *Walton*, and thus implicitly to urge this Court do so. The court observed that *Walton* rested on the assumption that Arizona's statutes did not " 'permit[] a judge to determine the existence of a factor which makes a crime a capital offense' " (Pet. App. at 24a (*quoting Apprendi*, 530 U.S. at 497); *cf. Jones*, 526 U.S. at 251), and authoritatively declared this premise to be incorrect. Pet. App. at 26a ("the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present"). Thus, whatever basis the *Walton* Court's construction of Arizona law may have had when that case was decided, the foundation of that decision is now fully eroded.

For these reasons, and in light of the confusion, uncertainty, and unfairness that the continued authority of *Walton* creates, we ask the Court to take this opportunity to reconsider *Walton* in light of the important constitutional principles announced in *Apprendi v. New Jersey*.[18]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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18. We are aware of two other pending petitions for certiorari presenting this question. *See* Petitions for Certiorari in *Hoskins v. Arizona*, No. 00-9744 (filed Apr. 30, 2001), and *Dickens v. Arizona*, No. 01-5474 (filed July 23, 2001).

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF ARIZONA DATED JUNE 20, 2001

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

Supreme Court No. CR-97-0428-AP

Maricopa County No. CR95-01754(A)

STATE OF ARIZONA,

Appellee,

v.

TIMOTHY STUART RING,

Appellant.

OPINION

June 20, 2001

Appeal from the Superior Court in Maricopa County
The Honorable Gregory H. Martin, Judge
AFFIRMED

* * *

Appendix A

FELDMAN, Justice.

¶1 On December 6, 1996, a jury found Defendant, Timothy Stuart Ring, guilty of first-degree murder, conspiracy to commit armed robbery, armed robbery, burglary, and theft. Defendant was sentenced to terms of imprisonment for the robbery, burglary, theft, and conspiracy convictions. Because the trial judge sentenced Defendant to death for the murder, direct appeal to this court is automatic. A.R.S. § 13-703.01. We have jurisdiction pursuant to Arizona Constitution article VI, § 5.3, A.R.S. § 13-4031, and Arizona Rules of Criminal Procedure 31.2.b.

FACTS AND PROCEDURAL HISTORY

¶2 At approximately 2:00 p.m. on November 28, 1994, a Wells Fargo armored van servicing Dillard's department store at Arrowhead Mall was reported missing by Dave Moss, the van's "hopper."[1] At approximately 6:30 p.m. that same day, a Maricopa County Sheriff's deputy discovered the missing van in the parking lot of a Sun City church. All of the van's doors were locked, the engine was running, and a body was slumped over on the passenger side. The body was that of the van's driver, John Magoch, who had been killed by a gunshot wound to the head.

¶3 Wells Fargo determined that its losses from the robbery totaled $833,798.12, of which $562,877.91 was in cash. Although no eyewitnesses to the crime came forward, one

1. "Hopper" is the slang term for a street messenger, which is the armored-car employee who enters businesses to collect/deliver money while the driver stays inside the armored vehicle.

Appendix A

person riding his bicycle in Sun City on the afternoon of the robbery claimed to have seen a white van, followed by a red pick-up truck, run a stop sign. This witness stated that one man was driving the red truck while two people were in the van. Another witness also saw a white van followed by a red pick-up truck. Although she remembered one man driving the van, she testified that either two or three men were in the red truck.

¶4 Through information provided by an informant, the Glendale Police Department contacted Judy Espinoza, who believed that her boyfriend James Greenham and a friend of Greenham's named "Tim" may have been involved in the robbery. "Tim" later turned out to be Defendant — Timothy Ring. Glendale Police interviewed Espinoza on December 30, 1994. Espinoza stated that when she heard about the robbery on the radio, she remembered that a week before Greenham had asked her what she would do "if he hit an Armored car." State's Exhibit # 33, at 2. Espinoza also remembered that, although Greenham had been staying with her, he was not at home on the night of the robbery and during that week he was "very stressed out." *Id.* at 3. In addition, shortly after the robbery, Greenham handed Espinoza a bag of rolled coins totaling approximately $250 and gave Espinoza's mother $800 in cash to pay bills. Finally, Espinoza informed the police that Greenham's friend Tim owned a red truck. About a week before the interview with police, Greenham had stopped dating Espinoza and had moved out of her home.

¶5 While conducting surveillance of Greenham, the police noticed that he appeared to be riding a new motorcycle.

Appendix A

Random phone calls to motorcycle dealerships revealed that, in December 1994, Greenham and Defendant made large cash purchases at Metro Motor Sports. Specifically, Defendant bought two ATVs and a motorcycle from the dealership for $7,500 and $7,300, respectively. Over the next several weeks, Defendant and Greenham both made many more expensive purchases, all of them cash transactions. Wiretaps on certain telephones belonging to Defendant and Greenham began on January 9, 1995. On January 21, 1995, Defendant called William Ferguson and discussed Greenham's purchase of a new truck, the trouble this caused with Greenham's ex-wife, and what impact that trouble might have on their plans "up north." State's Exhibit # 49A, at 11. In that call, Defendant threatened to "cut off" Greenham's supply, as Defendant held "both his and mine." *Id.* The two also talked about disappearing for two years after "up north happens," then reuniting in Las Vegas. *Id.* at 14. Four days later, Ferguson bought a new motorcycle for $8,700 cash, paying in fifty and one-hundred dollar bills.

¶6 On January 26, 1995, Greenham called Defendant's pager and entered the following code: 20*2000*04. He followed that call with another code: 50*5000*04. In conversations between Defendant and Ferguson, Defendant had referred to Greenham as "zero four." Later that day, Defendant asked Greenham, "The two pages you sent . . . those are your requests, is that right?" To which Greenham responded, "Yeah." State's Exhibit # 52A.

¶7 As part of the investigation of Defendant, arrangements were made with Waste Management Company to perform a "trash cover," enabling investigators to sort through and

Appendix A

survey Defendant's waste. During this process, police acquired two notecards, written by Defendant, with addresses of businesses serviced by Loomis Armored Cars, as well as numbers corresponding to Loomis trucks. Defendant was employed by Loomis in 1988-89 and, at trial, claimed that the notecards pertained to his employment at that time.

¶8 The police then attempted to generate discussion between the conspirators about the robbery. On January 31, 1995, the police issued a news release that was aired on local television stations. Defendant called Greenham at approximately 10:30 that evening and left a message on Greenham's answering machine to "remind me to talk to you tomorrow and tell you what was on the news tonight. Very important, and also fairly good." State's Exhibit # 55A. A few days later, Detective Tom Clayton from the Glendale Police Department left his business card on the door of Greenham's residence, requesting that Greenham call and "refer to lead 176." In response, Greenham made an emotional, panicked telephone call to Defendant. Greenham also apparently called his ex-wife, who was so concerned about his well-being that she asked Phoenix Police to visit Greenham's apartment to check on him. Coincidentally, Defendant stopped by Greenham's apartment at the same time. Defendant later discussed this incident with Ferguson, telling him "I don't know what to think of it. Uhm, his house is clean. Mine, on the other hand, contains a very large bag." State's Exhibit # 70A, at 7. Later that same day, Defendant also said, "it doesn't really make a whole lot of sense, because given the information that they do have, both public and what I've been able to ascertain privately . . . if they were gonna come after somebody, it would be me." State's Exhibit

71A, at 10-11. Ferguson ended the call by saying that he would "keep a suitcase packed." *Id.* at 17.

¶9 On February 14, 1995, the police again attempted to generate conversation by airing a "Silent Witness" re-enactment on the local news that contained several deliberately incorrect details about the robbery and murder. Defendant called Ferguson at 10:51 p.m. to talk about the broadcast. Ferguson claimed to have "laughed my ass off" and said he was "not real worried at all now." State's Exhibit # 80A, at 3. Defendant stated that "there's only one thing that slightly concerns me," and asked, "What if push comes to shove down the months and they ask for hair and fibers, so forth, and it happens to somehow . . . ." *Id.* at 4. Later in the conversation, Defendant said, "there was a couple of in continuities (sic) to their story . . . . They showed a suppressed revolver of all things." *Id.* at 25.

¶10 Two days later, on February 16, 1995, a search warrant was served on Defendant's residence. Police found a homemade sound suppressor attached to a Ruger 1022 rifle[2] barrel behind the hot water heater in a corner of Defendant's garage. Also in the garage, inside a storage cabinet, police discovered a green duffel bag with Defendant's name on it. The bag contained bundles of United States currency totaling $271,681. Defendant also had $1,040 in a headboard in the master bedroom. In a notebook found in the same headboard,

2. At trial, however, the state was unable to connect this weapon to the crime. The bullet that killed Magoch was not recovered, and the pathologist who performed the autopsy could not testify conclusively as to the type of weapon or caliber of bullet that caused Magoch's lethal wound.

police discovered a post-it note that had the number "575,995" on it. Below the number was the word "splits," with the three letters "F," "Y," and "T," and numbers below the letters totaling 575,995, which is remarkably similar to the total cash amount taken in the robbery. An expert testified that this note was written by Defendant. Greenham's friends often called him "Yoda"; thus, argued the state, the "Y" represented Greenham, the "F" was for Ferguson, and the "T" stood for Defendant. A search warrant served on Ferguson's residence also turned up $62,601. Approximately $200 was found at Greenham's apartment.

¶11 In his own defense, Defendant claimed to have made more than $100,000 as a confidential informant for the FBI. However, an agent for that agency testified that Defendant was only paid a total of $458. In addition, Defendant testified that his income included money made as a bounty hunter and gunsmith. However, Defendant only made $3,500 working for Don's Bail Bonds in 1993 and while working one month for A-1 Bail Bonds in 1994 was paid $1,600.

¶12 Based on this circumstantial evidence, a jury found Defendant guilty of felony murder for killing John Magoch. As required by statute, the trial judge conducted a special sentencing hearing. A.R.S. § 13-703.B. Under the Arizona system, this hearing is conducted without a jury — the judge makes the factual findings that determine whether the defendant is to be sentenced to life imprisonment or death. *Id.* Pursuant to a plea bargain[3] arranged after Defendant's

3. Greenham pled guilty to second-degree murder and two counts of armed robbery. At the time of the hearing, Greenham had yet to be sentenced, but expected to be imprisoned for 27.5 years.

jury verdict was received, Greenham testified at the sentencing hearing. Greenham admitted that he, Ferguson, and Defendant planned and executed the robbery. Greenham also testified that Defendant was the "leader because he laid out all the tactics," that Defendant shot the driver with a "Ruger . . . twenty-two rifle," and that, the day after the shooting, Defendant wanted to be "congratulate[d]" on his "shot." Reporter's Transcript ("R.T."), October 19, 1997, at 39, 44-45, 60.

¶13 In his special verdict, the trial judge found that Defendant "is the one who killed Mr. Magoch." Special Verdict, filed October 29, 1997, at 2. In addition, the judge determined that Defendant "was a major participant in the armed robbery of Mr. Magoch that resulted in him being killed and that the Defendant's conduct exhibited a reckless disregard for human life." *Id.* Finding the statutory aggravating circumstances of A.R.S. § 13-703.F.5 and 6 present, the judge stated that Defendant committed the offense "in expectation of the receipt of anything of pecuniary value" and "in an especially heinous, cruel or depraved manner." *Id.* at 3. These findings made Defendant eligible for a death sentence. A.R.S. § 13-703.F.5 & 6. While not finding the existence of any enumerated mitigating factors, the judge did acknowledge that Defendant's "minimal criminal record" was a mitigating factor. The judge then determined that the mitigating evidence, when weighed against the aggravating evidence, was insufficient to call for leniency and sentenced Defendant to death for the murder.

DISCUSSION

A. Trial issues

1. Suppression of wiretap evidence

¶14 The collection of wiretap evidence is governed by A.R.S. §§ 13-3001 – 13-3019. Defendant argues that, because normal investigative techniques were not exhausted, the affidavit supporting the necessity for electronic surveillance was deficient. In addition, Defendant claims that minimization requirements were not met. Thus, according to Defendant, the trial judge abused his discretion by not granting his motion to suppress. We review the denial of a motion to suppress for an abuse of discretion. *State v. Atwood*, 171 Ariz. 576, 603, 832 P.2d 593, 620 (1992).

a. Necessity

¶15 To satisfy the necessity requirement, an affidavit must state facts from which the judge may conclude that traditional methods have been tried and failed or are unlikely to succeed. A.R.S. § 13-3010.C.3; *State v. Hale*, 131 Ariz. 444, 447, 641 P.2d 1288, 1291 (1982). Conclusory statements or boilerplate recitations of difficulties inherent in any investigation do not satisfy the necessity requirement. *Id.* at 447, 641 P.2d at 1291. An affidavit in support of a wiretap order should be evaluated "in a commonsense and realistic, rather than a hypertechnical, manner." *Id.* at 446, 641 P.2d at 1230. The necessity requirement also "is to be interpreted in a commonsense fashion with an eye toward the practicalities of investigative work." *Id.* at 447, 641 P.2d

at 1231. Wiretaps should neither be "routinely used as the first step in criminal investigations" nor issued "in situations where conventional investigative techniques would be adequate to uncover the crime." *Id.* However, a wiretap does not have to be used "only as a last resort." *Id.*

¶16 Defendant claims that the state failed to exhaust normal investigative techniques before seeking electronic surveillance. Specifically, Defendant asserts that the state did not attempt to use undercover operations, informants, surveillance, or trash searches. While it is theoretically possible that other investigative techniques may have been successful, not all surveillance strategies must be exhausted before a wiretap application is appropriately granted. *State v. Politte*, 136 Ariz. 117, 129, 664 P.2d 661, 673 (App. 1982).

(1) The affidavit

¶17 Applying the foregoing principles to this case, we note first that when presenting the affidavit, the state submitted a detailed explanation of how other investigative procedures "have been tried and have failed, reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ." Affidavit in Support of Application for Interception, January 8, 1995, at 17. As for surveillance, not only was it unsuccessful when used to monitor the activities of co-conspirator Greenham (who drove erratically and appeared to be watching for following vehicles) but, the affidavit alleged, the effectiveness of surveillance as an investigative tool would be limited because it "can only confirm meetings of people" and "does not provide the physical/verbal evidence needed for prosecution of the case." *Id.* at 8.

According to the affidavit, the use of informants would be unsuccessful because "[b]oth Ring and Greenham are very selective on who they deal with and both are known to be 'street smart' and will not openly discuss aspects of the case." *Id.* The only possible informant, Judy Espinoza, no longer had contact with Greenham and had resisted Defendant's attempts to contact her out of fear that she would be killed if it was suspected or discovered that she was providing information to the police. The state also felt that, because of Defendant's habit of carrying a firearm, it would be dangerous to attempt to introduce an informant.

¶18 The affidavit went on to state that, although considered, undercover operations were rejected because of Defendant's prior training as a police officer, familiarity with undercover operations, and current contacts with law enforcement agencies. Pen registers, which trap and trace the numbers dialed and received from certain telecommunications equipment, were employed to gather evidence against Defendant. But, like surveillance, their effectiveness was limited, as they simply established that contacts were made without revealing the content of the communications. A grand jury investigation was ruled out because it would likely not provide sufficient evidence to support a successful prosecution, would necessitate granting immunity to one of the co-conspirators, and would perhaps allow co-conspirators to flee the state, retaliate against witnesses, or destroy potential evidence.

¶19 Although the state conceded that probable cause for a search warrant of Defendant's home existed at the time of the wiretap application, its affidavit alleged that not all

co-conspirators had been identified; locations of much of the evidence also had not been deduced. In addition, execution of a search warrant would have prematurely alerted other conspirators and, because the stolen money had not been marked, it was believed that any money recovered would not be able to be conclusively traced to the robbery. The affidavit noted that all of the "very little physical evidence" collected at the crime scene, as well as leads procured from potential witnesses, had been exhausted. Interviewing Defendant or Greenham was discounted as it would alert them to their status as suspects and provide them time to conceal and destroy evidence, give them reason to flee, or allow them to retaliate against witnesses.

¶20 As demonstrated by these numerous and detailed facts, the affidavit in this case fully complied with the necessity requirement. The order authorizing the wiretap was therefore proper.

(2) Hearing on motion to suppress

¶21 At the hearing on Defendant's motion to suppress the wiretap evidence, Defendant also argued that it was unreasonable to allow the wiretap until trash covers were completed and the use of informants had failed. Defendant even offered the following people as possible infiltrators: 1) Judy Espinoza, an ex-girlfriend of Greenham and the person who initially implicated Defendant; 2) Michael Sanders, an acquaintance of Defendant and a possible suspect in the robbery; 3) Brian Robbins, who had previously participated in another armed robbery with Defendant, Greenham, and Sanders; and 4) James Gonzales, a former associate of Defendant in his bounty-hunting enterprise.

¶22 When ruling against the motion, the trial judge addressed each of these arguments specifically. He found a trash cover to be "a risky venture with little probability of success." Minute Entry ("M.E."), October 18, 1996, at 3. The judge found that Espinoza was an "unreasonable" option because she "was afraid of [Defendant] and had effectively cut off all ties with both [Defendant] and Greenham." *Id.* at 2. The judge considered Sanders to be similarly unsuitable because he was on federal probation, had prior felony convictions, demanded a weapon if he met with Defendant, and told police he would, if he perceived danger, "take out" Defendant with a "preemptive strike." *Id.* The judge also found Defendant's arguments regarding Robbins and Gonzales "equally unconvincing." *Id.* at 3. Robbins could not pass a polygraph examination and asked for immunity for another armed robbery. Gonzales had been "kicked out of the group" months before and had not been in contact with Defendant since that time. *Id.*

¶23 Based on these well-articulated reasons, and considering the detail of the affidavit, the judge did not abuse his discretion in denying Defendant's motion to suppress on necessity grounds.

b. Minimization

¶24 Our statute requires that wiretaps be "conducted in such a way as to minimize interception of communications not otherwise subject to interception." A.R.S. § 13-3010.D.6. In determining whether monitoring agents comply with these minimization requirements, Arizona has followed the standard articulated in *Scott v. United States*, 436 U.S. 128,

98 S.Ct. 1717 (1978). *State v. Olea*, 139 Ariz. 280, 285, 678 P.2d 465, 470 (App. 1983). That standard requires an "objective assessment of the reasonableness of the monitoring agents' actions in light of all of the facts and circumstances confronting them at the time." *Id.* According to *Olea*, the following three factors should be considered in determining the objective reasonableness of the minimization attempt: 1) the investigation's nature and scope, 2) the government's reasonable expectations of the conversations' character, and 3) the extent of judicial supervision over the surveillance. *Id.*

¶25 Here, the wiretaps were instituted with the intent of uncovering the scope of the conspiracy, more specific details about the crime, and the location of valuable, as-yet-to-be-discovered evidence, as well as preventing furtherance of the conspiracy and identifying the third conspirator. The request was based on expectations that "persons involved in a criminal conspiracy use telephones" toward such ends and that one potential informant had already heard Defendant "use the phone to talk about the incident." Affidavit in Support of Application for Interception, January 8, 1995, at 22-23. A detailed "Wire Interception Minimization Guidelines" was read and signed by every agent involved in the monitoring. These guidelines gave specific instructions to the monitoring agents on how to legally perform their duties, including when to terminate calls that could possibly fall under a privilege. Approximately every ten days the officers in charge of minimization submitted detailed, extensive reports to the judge who issued both the initial and continuing orders for communication interceptions. These reports detailed the number of calls intercepted, with

a summary of the times and types of calls intercepted, as well as any malfunctions or other problems encountered. The reports also detailed both the evidence acquired and what was still being sought. In addition, the reports articulated the reasons for continued interception.

¶26 The facts establish careful investigative work. Although Defendant cites a few specific instances of non-minimization to support his claim that this case constitutes a significant violation of the minimization requirements, we must look to the totality of the circumstances to determine the reasonableness of the state's minimization attempts. *Olea*, 139 Ariz. at 285, 678 P.2d at 470. After analyzing the objective reasonableness of the monitor's actions within the context of the facts of this case, we agree with the trial judge when he stated:

> The contention that all the wiretaps must be suppressed because the monitors did not adequately minimize interception of the calls is without merit. The overwhelming number of calls were very short thus precluding any minimization. Additionally, the members of this group consistently jumped from topic to topic during their conversations. Moreover, the extent of the organization, and the possible involvement of others such as [Defendant's] wife, greatly hampered any reasonable and consistent effort to minimize interception of phone calls. Finally, under all of the circumstances, the police exercised reasonable efforts to minimize interception of non-relevant or privileged calls.

M.E., October 18, 1996, at 4. We conclude that the judge did not abuse his discretion in denying Defendant's motion to suppress.

2. Third-party defense evidence

¶27 Defendant argues that the trial judge's rulings prohibiting the introduction of evidence that a third party, Michael Sanders, committed the crime were errors requiring reversal. Again, we review the trial judge's decisions for abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369 ¶ 37, 956 P.2d 486, 496 ¶ 37 (1998).

¶28 Although a defendant may introduce evidence that shows that another person committed the crime for which the defendant is charged, the trial judge may exclude such evidence if it "simply affords a possible ground of suspicion against another." *Id.* at ¶ 38 (quoting *State v. Oliver*, 169 Ariz. 589, 590, 821 P.2d 250, 251 (App. 1991)). For third-party defense evidence to be admitted at trial, the defendant must demonstrate that the evidence has an "inherent tendency" to connect the third party to the "actual commission" of the crime. *Id.*; *see also State v. Fulminante*, 161 Ariz. 237, 252, 778 P.2d 602, 617 (1988).

¶29 Before trial, the state filed a motion to preclude Defendant from introducing evidence that anyone other than Defendant, Greenham, and Ferguson committed the charged crimes. Defendant's response challenged the motion as being "overly broad," "burdensome," and "highly prejudicial" to Defendant because granting the motion "would leave Defendant without a defense." Defendant's Response to

State's Motion to Preclude Third Party 404(B) Evidence and Defense, filed July 25, 1996, at 4, 8-9. Defendant then filed a supplement to his response, including an offer of proof, in which he asserted that evidence existed that other persons not named as defendants participated in and/or committed the alleged criminal offenses. Specifically, Defendant claimed that Sanders "precisely described" the manner in which the robbery and murder were committed, was an hour late to work on the day of the crimes, met with a detective from the Glendale Police Department seeking immunity from both the present and additional crimes in exchange for information, admitted that he would have "no problem" killing someone under the "right" circumstances, and was a convicted felon with a prior violent criminal history. In addition, Defendant asserted that the police maintained surveillance of Sanders for the specific purpose of determining the extent of Sanders' involvement in the crimes even after Defendant and his co-conspirators were arrested.

¶30 After taking the motion under advisement, the trial judge granted the state's request to preclude evidence that Sanders committed the crime. The judge noted that "the evidence shows Sanders may have been involved in the planning of the armed robbery. However, the evidence does not have an inherent tendency to *connect* Sanders with the commission of the offense." M.E., October 18, 1996, at 10. In addition, the judge stated that "[w]ithout more specifics, it is difficult to determine what evidence [Defendant] wishes to present." *Id.*

¶31 While cross-examining one of the state's witnesses, Defendant asked the witness whether he was "personally

familiar" with Michael Sanders. The state objected and, out of the presence of the jury, Defendant stated that "as long as the defense can make the nexus," he was allowed to "go into that area." R.T., November 19, 1996, at 84. Defendant was apparently attempting to elicit evidence that a witness remembered seeing a man who resembled Sanders in the vicinity of the van two route stops before the scene of the crime. The trial judge reminded Defendant that he must "prove the connection" between Sanders and either the planning or commission of the crimes, as well as present it to the court "out of the presence of the jury," before he would allow the evidence to be admitted. Pressed by Defendant, the judge described the type of necessary "nexus" as follows:

> If [Defendant can] show that [Sanders] participated in the planning and talk about the robbery and then you have, you have what is arguably his identification at the scene, or as the cars are being driven away, I said I think in my mind, that may be enough to prove the connection, or the nexus for you to pursue the defense and to argue it to that jury.

Id. at 94. Defendant did not attempt to assert the third-party defense again during the remainder of the trial.

¶32 Arguably, Defendant's evidence regarding Sanders was relevant to establish that Sanders was involved in the planning of the crimes. But while the evidence Defendant claims he may have produced about Sanders might implicate Sanders as a participant in the planning of the crimes, it would not have exculpated Defendant for his role in both planning

and committing the crimes. Based on this important distinction, there was no abuse in the trial judge's decision to reject the third-party defense evidence. Because implicating Sanders would not tend to exculpate Defendant, we conclude that even if it was error to preclude the evidence regarding Sanders, the error did not, beyond a reasonable doubt, contribute to or affect the verdict. *State v. Fulminante*, 193 Ariz. 485, 500 ¶ 49, 975 P.2d 75, 90 ¶ 49 (1999). Therefore, given the facts of this case, any error is harmless. *Id.*

3. New trial motion

¶33 Defendant claims that the trial judge abused his discretion when he denied Defendant's new trial motion. Defendant specifically argues that a new trial should have been granted based on the FBI's failure to provide Defendant's entire FBI file and the state's failure to disclose both a witness' pre-hypnotic videotape testimony and evidence supporting Defendant's third-party defense. Only the first of these three issues was raised in Defendant's *timely* new trial motion. Ariz.R.Crim. P. 24.1.b ("A motion for new trial shall be made no later than 10 days after the verdict has been rendered."). Several claims, including the other two issues argued by Defendant here, were raised in subsequent *untimely* new trial motions.[4] The trial court has no jurisdiction

4. The verdicts in Defendant's case were rendered on December 6, 1996. Defendant timely filed a new trial motion by December 16, 1996. Almost a year later, on September 15, 1997, Defendant filed a "supplemental" motion for new trial. Both the next day, and two days after that, Defendant again filed supplemental new trial motions. (Cont'd)

to grant a new trial motion if it is not made within ten days after the verdict. *State v. Hickle*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981). Because the trial judge did not have jurisdiction to consider Defendant's claims raised in an untimely new trial motion, those redundant claims will not be addressed by this court on appeal. Of course, Defendant can raise these claims in post-conviction relief proceedings pursuant to Ariz.R.Crim.P. 32.1 *et seq*. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). Therefore, only the first issue needs to be examined: Whether the trial judge should have granted a new trial based on the fact that Defendant did not receive his entire FBI file.

¶34 In making this argument, Defendant relies on Ariz.R.Crim.P. 24.1.C.5, which states that the trial judge may grant a new trial when "[f]or any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial." Defendant claims that, without the entire file, he was unable to support his claim that the money found in his home was compensation for his work as an FBI informant or to refute the trial testimony of an FBI agent that Defendant was never paid substantial amounts of money as an informant.

¶35 Defendant bases his argument on a discrepancy between the size of the file forwarded to him before trial from the

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(Cont'd)
Labeling untimely motions as supplemental does not enable a party to avoid the time restrictions imposed by procedural rules — especially those rules, such as Ariz.R.Crim.P. 24.1.b, that confer jurisdiction on the trial court. *State v. Hickle*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981).

FBI, which was approximately 20-25 pages, and trial testimony from an FBI agent that Defendant's file is "about two inches thick." R.T., October 9, 1997, at 5; R.T., December 4, 1996, at 36. First, we must recognize that the FBI agent may have inadvertently misstated or simply overestimated the size of Defendant's file. If, however, Defendant is correct about the actual size of his file, then he has failed to demonstrate that his receipt of only a portion of his FBI file was due to anyone's fault but his own. Upon receipt of what was to Defendant an obviously incomplete file (which Defendant would have realized when information about the activities he claims should have been in the file was discovered missing), Defendant should have acted to procure the entire file. Instead, Defendant apparently waited until trial and used the alleged discrepancy to argue that the FBI was unwilling to proffer the entire file as part of a more general cover-up or conspiracy theory. Unsuccessful with that argument, Defendant waited until filing a new trial motion to complain that, based on no fault of his own, he did not receive the entire FBI file and the incomplete disclosure precluded him from properly procuring a defense. Based on this reasoning, Defendant has not satisfied the necessary requirement that he have no responsibility in the alleged trial taint. *See* Ariz.R.Crim.P. 24.1.C.5. In addition, trial testimony demonstrated that it would be unlikely that the FBI file would corroborate Defendant's claims.[5]

¶36 At trial, Agent Michael Fain of the FBI's Phoenix office testified that the total amount given to Defendant for his

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5. Our disposition of this issue does not preclude Defendant from raising it as a *Brady* claim in post-conviction relief proceedings pursuant to Ariz.R.Crim.P. 32.1. *See supra* ¶ 33.

services as an informant was $485. Fain also testified that he was the only individual, and the Phoenix office the only office, to have "administrative control" of any informant operating in the Phoenix area. R.T., November 20, 1996, at 47. Thus, according to Fain's testimony, no other FBI agent would have paid Defendant to work as an informant.

¶37 Defendant later took the stand and controverted Fain's testimony. Defendant claimed that he performed many services for the FBI and was paid "a total of about a hundred and five thousand dollars," all of which was paid in cash. R.T., December 12, 1996, at 162. On cross-examination, Defendant stated that "the majority of the income" he made from the FBI, including the $105,000, was not paid through Agent Fain but by an Agent Dan Steel. Defendant claimed to have been paid $35,000, $45,000, and $25,000 by Agent Steel for three separate assignments in Mexico. Although many of Defendant's prior, documented meetings with the FBI included the presence of other persons, Defendant claimed to have completed his Mexico assignments with anonymous contacts and to have always met with Agent Steel alone.

¶38 To rebut this testimony the state called Special Agent Mark Tanner, an assistant special agent in charge of Phoenix. Tanner described the process implemented to pay informants, which included issuing checks to agents (who in turn cash the checks and pay the informants in cash), returning receipts for payment, and acquiring permission from headquarters for any amount in excess of $20,000. Tanner testified that it would not be possible for an agent to get money without following the procedure. Tanner also denied that Defendant

was ever paid in excess of $20,000. Finally, Tanner told the jury that he had never known an Agent Dan Steel, that an agent with that name did not work in the Phoenix division, and, to his knowledge, no agent by that name had ever visited Phoenix.

¶39 Defendant's alleged inability to access his entire FBI file did not render his trial so unfair as to require the granting of a new trial. Therefore, the trial judge did not abuse his discretion in denying Defendant's new trial motion.

B. Sentencing issues

1. Constitutional challenge

¶40 Defendant argues that, in light of the United States Supreme Court's decisions in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), Arizona's capital sentencing scheme violates the Sixth and Fourteenth Amendments to the United States Constitution. In response to Defendant's claims, the state counters that *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990), which approved Arizona's present judge-sentencing procedure for capital cases, is still the controlling authority on point. While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*. Of course, it could also be said that because a majority of the Court refused to expressly overrule *Walton*, the apparent scope of *Apprendi* and *Jones* is not as broad as some of the language of the two opinions suggests. The unclear language

of the Court's *Apprendi* and *Jones* opinions makes either of these interpretations reasonable and, therefore, we believe the practical operation of Arizona's death penalty scheme, as applied under the peculiar facts of the present case, requires some further explication.

¶41 The background is this: While upholding a federal carjacking statute, the *Jones* Court reasoned that "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range" would violate the Sixth Amendment. 526 U.S. at 248, 119 S.Ct. at 1226. *Apprendi*, a case involving the charge of unlawful possession of a firearm, presented the question of whether proof of a so-called hate crime motive was a sentencing factor or an element of the crime. 530 U.S. at 471, 120 S.Ct. at 2352. In *Apprendi*, the majority held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. at 2362-63. The majority, citing *Walton*, went on to reject the argument that *Apprendi* might jeopardize a capital sentencing scheme like Arizona's by describing such a scheme as a system that merely "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and not as a system that "permits a judge to determine the existence of a factor which makes a crime a capital offense." *Id.* at 496-97, 120 S.Ct. at 2366 (internal citation omitted). In dissent, Justice O'Connor challenged the majority's rationale as follows:

> The distinction of *Walton* offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . . If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

Id. at 538, 120 S.Ct. at 2388 (citations and internal quotations omitted).

¶42 In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release. A.R.S. § 13-703.A-E. It is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death. A.R.S. § 13-703.B ("The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution

of the United States or this state."). And even then a death sentence may not legally be imposed by the trial judge unless at least one aggravating factor is found to exist beyond a reasonable doubt. *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13 (1983); *see also* A.R.S. § 13-703.E ("the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated"). Thus, when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present. The judge makes that finding on the basis of the evidence presented at trial and any other evidence presented at the aggravation/mitigation hearing. A.R.S. § 13-703.C. If the judge finds an aggravating circumstance, he must then proceed to determine if there are any mitigating circumstances. A.R.S. § 13-703.E. If the judge finds mitigating circumstances, he must then weigh them against the aggravators and decide by "special verdict" whether a death sentence is appropriate. A.R.S. § 13-703.D & E.

¶43 Therefore, the present case is precisely as described in Justice O'Connor's dissent — Defendant's death sentence required the judge's factual findings. Specifically, the trial judge in this case made the necessary factual finding to support the aggravating circumstance that the killing was heinous and depraved. *See* A.R.S. § 13-703.F.6. That finding was based solely on Greenham's testimony at the separate sentencing hearing and was never heard by the jury.

¶44 We recognize that the United States Supreme Court has explicitly refrained from overruling *Walton*.

See, e.g., *Apprendi*, 530 U.S. at 496, 120 S.Ct. at 2366 ("[T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.") (citing *Walton*, 497 U.S. at 647-49, 110 S.Ct. at 3054-55); *Jones*, 526 U.S. at 250, 119 S.Ct. at 1228. Although Defendant argues that *Walton* cannot stand after *Apprendi*, we are bound by the Supremacy Clause in such matters. Thus, we must conclude that *Walton* is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either *Apprendi* or *Jones*. Putting aside Defendant's constitutional challenge to Arizona's death penalty scheme, we turn to the other sentencing issues he raises.

2. Actual killer/*Enmund-Tison* finding

¶45 Defendant claims that the trial judge erred in finding that Defendant killed Magoch because the "sole proof" supporting such a finding was the testimony of Greenham, a person who lacked credibility. For the same reasons, Defendant also claims that insufficient evidence existed to support the trial judge's *Enmund/Tison* finding. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368 (1982); *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987).

¶46 Only six of the twelve jurors found Defendant guilty of premeditated murder. However, the jury unanimously found Defendant guilty of felony murder. Because Defendant was convicted of only felony murder, we must ascertain whether

he is death eligible. In *Enmund*, the United States Supreme Court held that a felony murder defendant could receive the death penalty only if he actually killed, attempted to kill, or intended to kill. 458 U.S. at 797, 102 S.Ct. at 3376. The Court's subsequent decision in *Tison* expanded this rule, allowing capital punishment when the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. 481 U.S. at 157-58, 107 S.Ct. at 1688.

¶47 In his special verdict, the trial judge here found that:

> the Defendant is the one who killed Mr. Magoch. The evidence also clearly established beyond a reasonable doubt that the Defendant was a major participant in the armed robbery of Mr. Magoch that resulted in him being killed and that the Defendant's conduct exhibited a reckless disregard for human life.

Special Verdict, at 2.

¶48 Without Greenham's testimony at the sentencing hearing, we conclude that the evidence admitted at trial failed to prove, beyond a reasonable doubt, that Defendant was a major participant in the armed robbery or that he actually murdered Magoch. The presence of $270,000 in Defendant's garage, scraps of paper written by Defendant regarding other armored car routes and "splits" of money, and intercepted phone calls between Defendant, Ferguson, and Greenham only proved that Defendant helped plan the robbery. None of it, however, linked Defendant to the act of killing Magoch.

In addition, although there was evidence that Defendant's truck may have been used in the robbery, no trial evidence ever placed Defendant at the scene. A rifle with an attached homemade silencer was recovered from Defendant's garage; yet that weapon was never conclusively connected to the murder. Although the trial evidence established Defendant's participation in planning the robbery and his further participation in concealing the proceeds from the crime, it provided almost nothing about why Magoch was killed or who carried out the murder. There also was no evidence at trial to establish even reckless indifference. For all we know from the trial evidence, Defendant did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains why the jury found Defendant guilty of felony, but not premeditated, murder.

¶49 When imposing sentence in a capital case, the trial judge does not rely exclusively on the evidence admitted at trial but also takes into consideration the evidence presented at the sentencing hearing. A.R.S. § 13-703.E. Given Greenham's testimony that he, Ferguson, and Defendant "planned on robbing an armored car," that Defendant had "taken the role as leader," and Defendant "shot Mr. Magoch," the trial judge's finding is supported. R.T., October 19, 1997, at 38-40.

3. Aggravating factors

a. Heinousness and depravity

¶50 Defendant challenges the trial judge's finding of the aggravating circumstance that Defendant murdered Magoch

in a heinous or depraved manner. A.R.S. § 13-703.F.6. At the sentencing hearing Greenham stated that when he, Defendant, and Ferguson met the day after the robbery to count the stolen money, the three were in a "pretty happy mood" because they "had all the money." R.T., October 9, 1997, at 59. In addition, although Greenham said he was "distraught because Mr. Magoch was dead," he testified that Defendant stated in an "offhand" manner, "you guys are forgetting something . . . you're forgetting to congratulate me on my shot." It is exclusively from this testimony that the trial judge based his finding that Defendant "did not appreciate the seriousness of his conduct," "took great liking or enjoyment in his actions," displayed "an abhorrent lack of regard for human life," and "seemed to savor or enjoy the murder." Special Verdict, at 4. In short, the judge believed Defendant "relished" the murder. Although the judge noted that he was "mindful in determining the facts as to this statutory aggravating circumstance" that Greenham's "credibility as a witness is an issue" and that Greenham's "statement is uncorroborated," he nonetheless "resolve[d] that Mr. Greenham is credible." *Id.* at 3. Relishing a victim's death is one of the enumerated *Gretzler* factors that will support a finding of heinousness or depravity. 135 Ariz. at 52, 659 P.2d at 11.

¶51 Defendant argues that uncorroborated testimony from an accomplice that he celebrated is insufficient evidence to support a finding of relishing. *See State v. Smith*, 138 Ariz. 79, 86, 673 P.2d 17, 24 (1983). Even assuming Greenham's testimony was credible, Defendant says the statements attributed to him merely demonstrate that he is a callous individual, indifferent to human life, who was impressed with

his marksmanship. Defendant was a promising competitive shooter, had extensive firearms training, and even assisted as a firearms instructor for correctional officers. Therefore, Defendant argues, his comment was merely an expression of pride over his marksmanship.

¶52 The analysis of heinousness and depravity "focus[es] on the defendant's mental state and attitude as reflected by his words and actions." *State v. Brewer*, 170 Ariz. 486, 502, 826 P.2d 783, 799 (1992). In addition, post-murder behavior is relevant when it provides evidence of the killer's state of mind at the time of the offense. *State v. Greene*, 192 Ariz. 431, 440 ¶ 39, 967 P.2d 106, 115 ¶ 39 (1998). Although a perpetrator's cold and deliberate actions may establish the requisite intent for the crime of first-degree murder, they do not demonstrate heinousness or depravity and are of no consequence in making the sentencing decision. *State v. Smith*, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985). Statements suggesting indifference constitute relishing only when they indicate that the killer savored or enjoyed the murder. *Greene*, 192 Ariz. at 440-41 ¶ 39, 967 P.2d at 115-16 ¶ 39.

¶53 Although Defendant's statements reflect a calculated plan to kill, satisfaction over the apparent success of his plan, and an extreme callousness or lack of remorse after the murder, the evidence does not support a finding that Defendant actually relished the *act* of murdering Magoch. Thus, the statements do not demonstrate that Defendant's state of mind during the time of the offense was heinous or depraved.

¶54 The state argues that because the armored car could have been robbed without killing Magoch, the murder was senseless and we can independently uphold the trial judge's finding of depravity and heinousness based on the senselessness of the crime. The murder of a victim when it was unnecessary to carry out the robbery may be senseless. *State v. Medina*, 193 Ariz. 504, 514 ¶ 39, 975 P.2d 94, 104 ¶ 39 (1999). The state asserts that Defendant could have seized the armored van without killing Magoch, whom the state claims was standing outside the van. However, there was no testimony offered at trial that supported this argument except that Magoch, who was a smoker, had a tendency to open the van's driver-side door for ventilation while he smoked because the windows in the van did not roll down. Indeed, no trial testimony substantiated the state's theory that this was the situation at the time the armored van was taken. In contrast, Greenham testified at the sentencing hearing that, on the day of the robbery, Magoch had "opened his door about six to eight inches" to smoke a cigarette. R.T., October 9, 1997, at 45. According to Greenham, Magoch was turned sideways in his seat with the van door slightly open, only his head was outside of the van, and his feet were resting on "the little van ledge." *Id.* at 78. In such circumstances, it is possible the perpetrators believed that, absent a potentially protracted and boisterous struggle, successfully subduing Magoch or gaining access to the vehicle was improbable without killing him first. While none of these grisly speculations justify or mitigate the crime, they do illustrate that the entire inquiry is pointless. Any murder is senseless in its brutality and finality. Yet not all murders are senseless as this term is used to distinguish those first-degree murders that deserve a death sentence and those that

do not. We classify the senselessness of Magoch's death in this case as one of the latter.

¶55 Finally, senselessness alone cannot support a heinous/depraved finding. *State v. Lee*, 189 Ariz. 590, 605-06, 944 P.2d 1204, 1219-20 (1997). Indeed, in previous robbery cases in which we have upheld a death sentence based on senselessness, senselessness has been present as a makeweight in combination with other aspects of heinousness and depravity. *See, e.g.*, *Medina*, 193 Ariz. at 514 ¶ 41, 975 P.2d at 104 ¶ 41 (relishing, gratuitous violence, and helplessness); *State v. Hyde*, 186 Ariz. 252, 282, 921 P.2d 655, 685 (1996) (helplessness and gratuitous violence); *State v. Jackson*, 186 Ariz. 20, 30, 918 P.2d 1038, 1048 (1996) (helplessness and relishing); *State v. Runningeagle*, 176 Ariz. 59, 65, 859 P.2d 169, 175 (1993) (helplessness and relishing); *State v. Spencer*, 176 Ariz. 36, 43, 859 P.2d 146, 153 (1993) (needless mutilation of victim); *State v. Comer*, 165 Ariz. 413, 429, 799 P.2d 333, 349 (1990) (relishing, gratuitous violence, and helplessness); *State v. Correll*, 148 Ariz. 468, 481, 715 P.2d 721, 734 (1986) (gratuitous violence and helplessness).

¶56 We conclude that the evidence in this case does not support a finding of depravity or heinousness beyond a reasonable doubt. Therefore, the trial judge's finding of the heinous and depraved factor is disapproved.

b. Pecuniary gain

¶57 To prove pecuniary gain as an aggravating factor the state must demonstrate that the motivation for the murder

was the expectation of financial gain. *State v. Trostle*, 191 Ariz. 4, 17-18, 951 P.2d 869, 882-83 (1997). Here, killing Magoch was for no other comprehensible reason than to facilitate the robbery. When making his finding in the special verdict, the trial judge stated:

> The evidence clearly shows beyond a reasonable doubt that Mr. Magoch was killed in order to obtain the approximately one-half million dollars in cash in the armored car. Taking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result.

Special Verdict, at 3. Under the facts of this case, including Greenham's testimony, the trial judge's finding is "clearly warranted." *Cf. State v. Poland*, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985). Therefore, the trial judge's application of the pecuniary gain aggravating factor is supported.

¶58 Defendant claims, in both his brief and again at oral argument, that A.R.S. § 13-703.F.4 and 5 make the buying and selling of murder an aggravating factor and that one should not be put to death for the "common sin of greed." Arguably, there once was "considerable disagreement" as to the meaning of subsection F.5. *Greene*, 192 Ariz. at 445 ¶ 69 n.1, 967 P.2d at 120 ¶ 69 n.1 (Zlaket, C.J., dissenting). However, this court has long interpreted F.5 to include any murder in which pecuniary gain was a motive, cause, or impetus and not merely the result of the killing. *State v. Kayer*, 194 Ariz. 423, 433 ¶ 32, 984 P.2d 31, 41 ¶ 32 (1999). In addition, we do not consider the planned robbery and murder of an armored car driver to be simply a result of the "common sin of greed." Defendant's argument is without merit.

4. Mitigating factors

a. Lack of prior criminal history

¶59 In his special verdict, the trial judge did not find the presence of any statutory mitigating circumstances and determined that only one unenumerated mitigating circumstance existed: Defendant's minimal criminal record. Apparently, neither Defendant nor his attorney presented much mitigating evidence to the court because, as Defendant's attorney explained during the sentencing hearing, it was believed that:

> The sole issue in this case is going to be for the Court to determine whether or not the State has proven [Defendant's] participation and the extent of that participation beyond a reasonable doubt; i.e., did he or did he not personally kill John Magoch in this case.

R.T., October 20, 1997, at 7. Addressing this issue in his special verdict, the trial judge noted:

> This Court rejects that the Defendant has proved by a preponderance of the evidence that Mr. Greenham, and not the Defendant, was the shooter or that the Defendant was not at the scene of the robbery/murder regardless of who else may have been present and shot Mr. Magoch.

Special Verdict, at 5.

¶60 On appeal, Defendant argues that the judge failed to give sufficient weight to Defendant's minimal criminal record, especially in light of Defendant's previous work as a bounty hunter, police and correctional officer, and confidential informant. Although Defendant does not have any prior felony convictions, he does have two prior misdemeanor convictions for carrying a concealed weapon and impersonating a public servant arising out of a bounty-hunting incident in 1993. In addition, Defendant's employment as a police officer was less than exemplary. The chief of the police department at which Defendant was employed for approximately a year stated that Defendant was fired for insubordination when he refused to respond to a homicide scene in favor of engaging in a high-speed chase. As for Defendant's experiences as a correctional officer, bounty hunter, and confidential informant, it is difficult to imagine how these jobs serve as mitigating circumstances. Instead, because Defendant abused his law-enforcement experience and contacts before and after the crimes — to plan and execute the murder, as well as to attempt to avoid capture — these facts, even if mitigating, are entitled to minimal weight.

b. Other possible mitigation evidence

¶61 Because Defendant claims to have not participated in the crime at all, the statutory mitigating circumstance of minor participation is inapplicable. A.R.S. § 13-703.G.3. Nevertheless, the evidence would not support such a finding. Although Defendant continues to insist on his complete innocence, when a defendant is found guilty beyond a reasonable doubt, unsupported and unfounded claims of

actual innocence do not constitute mitigation for sentencing purposes. *State v. Amaya-Ruiz*, 166 Ariz. 152, 179, 800 P.2d 1260, 1287 (1990). Even if residual doubt is a mitigating circumstance, on this record we are left with no residual doubt about Defendant's guilt. In addition, no other evidence exists in the record to merit leniency.

5. Independent reweighing

¶62 We have determined that the trial judge incorrectly found the aggravating factor of heinousness and depravity. *See supra* ¶ 56. When the trial judge errs in aggravation or mitigation findings, remand is generally not appropriate unless the judge wrongly excluded evidence or the record does not adequately reflect all of the relevant facts. A.R.S. § 13-703.01.C. Neither situation is present here. In his special verdict, the trial judge added the following:

> The Court specifically notes that had the State proved beyond a reasonable doubt only [the] statutory aggravating circumstance [of pecuniary gain] that there remains still no mitigating circumstances sufficiently substantial to call for leniency. This was a cold-blooded, very calculated and premeditated murder to facilitate the robbery of thousands and thousands of dollars. The evidence is overwhelming that the Defendant was a principal, chief participant in the whole scheme.

Special Verdict, at 5-6.

¶63 We have previously upheld the death penalty in a case in which pecuniary gain was the only aggravating

circumstance. *See State v. Hensley*, 142 Ariz. 598, 603-04, 691 P.2d 689, 694-95 (1984) (defendant was sentenced to death after shooting three people in the course of robbing a bar; only mitigating circumstance was that defendant had obtained a G.E.D.). After our independent review, we conclude that even crediting Defendant's minimal criminal record, the mitigating evidence is not sufficient to call for leniency in light of the facts of this case. This murder was not the result of sudden impulse or loss of control nor a robbery gone bad but a planned, ruthless robbery and killing.

C. Alleged constitutional defects raised to avoid preclusion

¶64 Defendant brings numerous constitutional challenges to Arizona's death penalty scheme to avoid potential procedural default and preserve review. We have previously addressed the challenges as follows:

> Requirement that mitigating circumstances be proven by a preponderance of the evidence improperly precludes certain mitigating facts, rejected in *State v. White*, 194 Ariz. 344, 355 ¶ 49, 982 P.2d 819, 830 ¶ 49 (1999).
>
> Arizona's death penalty statute is unconstitutional on its face and as applied, rejected in *id.*; *State v. Schackart*, 190 Ariz. 238, 260, 947 P.2d 315, 337 (1997); *but see supra* ¶¶ 40-44.
>
> Arizona's death penalty statute is unconstitutional because it requires death when, in the absence of any mitigating circumstances, only one aggravating circumstance is found, rejected in *State v. Van Adams*, 194 Ariz. 408, 422 ¶ 55, 984 P.2d 16, 30 ¶ 55 (1999).
>
> Arizona's death penalty statute is unconstitutional because defendants do not have an opportunity to death qualify the sentencing judge, rejected in *White*, 194 Ariz. at 355 ¶ 49, 982 P.2d at 830 ¶ 49.
>
> Arizona's death penalty statute fails to provide proper guidance to the sentencing judge, rejected in *Van Adams*, 194 Ariz. at 422 ¶ 55, 984 P.2d at 30 ¶ 55.
>
> Arizona's death penalty statute is unconstitutional as it requires a defendant to prove that his life should be spared, rejected in *id.* at 423 ¶ 55, 984 P.2d at 31 ¶ 55.
>
> Arizona's death penalty statute is unconstitutional as it fails to sufficiently channel the sentencing judge's discretion, rejected in *id.*
>
> Arizona's death penalty statute is unconstitutional because it fails to require the state to prove that a sentence of death is appropriate, rejected in *id.*
>
> The lack of proportionality review is a due process violation, rejected in *id.*

Appendix A

Arizona's death penalty statute is unconstitutional because it does not require the sentencing judge to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, rejected in *White*, 194 Ariz. at 355 ¶ 49, 982 P.2d at 830 ¶ 49.

Arizona's death penalty statute is unconstitutional because it fails to provide a defendant the means to voir dire the sentencing judge, rejected in *id.* at 356 ¶ 49, 982 P.2d at 831 ¶ 49.

CONCLUSION

¶65 For the foregoing reasons, we affirm Defendant's convictions and sentences.

_____

STANLEY G. FELDMAN, Justice

CONCURRING:

_____

THOMAS A. ZLAKET, Chief Justice

_____

CHARLES E. JONES, Vice Chief Justice

_____

RUTH V. McGREGOR, Justice

Appendix A

MARTONE, Justice, concurring in the judgment.

¶66 While I join the court in affirming the convictions and sentences, I write separately to explain why I do not join part B(1) and paragraph 48 of part B(2) of the court's opinion.

I.

¶67 In part B(1), the court says "we must acknowledge that both cases [*Jones* and *Apprendi*] raise some question about the continued viability of *Walton*." *Ante*, ¶ 40. The court goes on to say it must explain Arizona's death penalty scheme because of the "unclear language of the Court's *Apprendi* and *Jones* opinions." *Id.* But *Apprendi* was quite express in distinguishing *Walton*. The opinion states that "this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi v. New Jersey*, 530 U.S. 466, 496, 120 S.Ct. 2348, 2366 (2000). The Court noted that the judge does not determine the existence of a factor which makes a crime a capital offense. Rather, the statute itself defines first degree murder as a capital offense. The jury finds the defendant guilty of all of the elements of first degree murder. "[I]t may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." *Id.*, 120 S.Ct. at 2366 (citation omitted).

¶68 The majority seizes upon language in the *Apprendi* dissent to question *Walton*. But the dissent in *Apprendi* was

not a challenge to *Walton*. Instead, it was a challenge to the majority holding in *Apprendi*. The *Apprendi* dissent acknowledged that the *Apprendi* majority likely held "that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment *beyond the prescribed statutory maximum*." 530 U.S. at 540, 120 S.Ct. at 2389 (O'Connor, J., dissenting) (emphasis in original). Justice O'Connor noted that because A.R.S. § 13-1105(C) "itself authorizes both life imprisonment and the death penalty," *id.*, 120 S.Ct. at 2389, the statute authorizes the maximum penalty of death in a formal sense.

¶69 In this case, Ring's punishment was not above the statutory range allowed by the jury's guilty verdict. Death is plainly within the statutory range of a guilty verdict for first degree murder. A.R.S. § 13-1105(C). Such a verdict is essential to a finding that a defendant is death eligible. Only first degree murder is a capital offense. One cannot be sentenced to death without such a verdict. The jury must find all the elements of the charge under *Apprendi* and the Sixth Amendment. The factual findings in aggravation and mitigation made by the trial court are not elements of the charge triable by jury under the *Sixth* Amendment, but rather, capital sentencing limitations driven by the *Eighth* Amendment. *Walton v. Arizona*, 497 U.S. 639, 648, 110 S.Ct. 3047, 3054-55 (1990).[1]

1. The Court explained in *Walton:*

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in

(Cont'd)

(Cont'd)

> Arizona they are "elements of the offense." But as we observed in *Poland v. Arizona*, an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.*, preclude the death penalty)." Our holding in *Cabana v. Bullock*, provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund v. Florida* finding — that the defendant killed, attempted to kill, or intended to kill — in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense,' " and that "while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.
>
> We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

497 U.S. at 648-49, 110 S.Ct. at 3054-55 (citations omitted).

Appendix A

II.

¶70 In *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), the Court made it clear that *Enmund/Tison* findings may be made by the trial court and even an appellate court, rather than a jury. And yet, without explanation, the majority says that it is relevant that "[w]ithout Greenham's testimony at the sentencing hearing, we conclude that the evidence admitted at trial failed to prove, beyond a reasonable doubt, that Defendant was a major participant in the armed robbery or that he actually murdered Magoch." *Ante*, ¶ 48. I do not understand the relevance of any of the observations made in paragraph 48 of the majority's opinion. It would have been enough to say that the trial court's *Enmund/Tison* finding was supported by the evidence. The presence of paragraph 48 in the majority opinion, together with its discussion of *Apprendi*, suggests that the majority not only believes that *Apprendi* may affect *Walton*, but that *Apprendi* may affect *Cabana*. Yet *Apprendi* makes no mention of *Cabana*, and Ring does not raise the issue here. I would not reach out to comment on issues not presented.

FREDERICK J. MARTONE, Justice

APPENDIX B — SPECIAL VERDICT (COUNT I) OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED AND FILED OCTOBER 29, 1997

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. CR 95-01754

STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY STUART RING

Defendant.

SPECIAL VERDICT
(Count I)

Based upon the evidence adduced at the trial and the sentencing hearing and a review of the presentence report and the Court's file this Court now renders this Special Verdict as to Count I, Murder in the First Degree.

The Defendant was found guilty of Count I, Murder in the First Degree, by a jury on December 6, 1996. The victim was John Magoch.

This Court conducted an aggravation/mitigation sentencing hearing pursuant to ARS Section 13-703(B) on October 9 and 20, 1997. Both the State and the Defendant were given the opportunity to present evidence and argument concerning the existence or nonexistence of the aggravating and mitigating circumstances included in ARS Sections 13-703(F) and (G); and both parties were given the opportunity to present any other relevant mitigating circumstances not specifically included in subsection (G) for the Court's consideration.

All the material in the presentence report has been disclosed to the Defendant's attorney and to the prosecution.

ENMUND-TISON FINDINGS

The State charged the Defendant in Count I with Murder in the First Degree alleging that the Defendant knowing that his conduct would cause death, with premeditation, caused the death of Mr. Magoch. The State also alleged, alternatively, that the Defendant acting either alone or with one or more other persons committed or attempted to commit the crime of armed robbery and in the course of and in furtherance of this crime or immediate flight from this crime the Defendant or another person caused the death of Mr. Magoch. All twelve members of the jury voted the Defendant guilty of felony murder. Six members also voted the Defendant guilty of premeditated murder.

For the Court to impose a death sentence in this case the Court must first find beyond a reasonable doubt that the Defendant was the killer, or that the Defendant intended to

kill or attempted to kill, or that the Defendant was a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life.

The Court finds beyond a reasonable doubt based upon the evidence adduced at trial and at the aggravation/mitigation sentencing hearing that the Defendant is the one who killed Mr. Magoch. The evidence also clearly establishes beyond a reasonable doubt that the Defendant was a major participant in the armed robbery of Mr. Magoch that resulted in him being killed and that the Defendant's conduct exhibited a reckless disregard for human life.

The facts as established by the evidence are that the Defendant was the mastermind of this criminal scheme — the person who planned and directed the robbery and shot Mr. Magoch. Many thousands of dollars in cash was taken from the armored car which Mr. Magoch drove. Approximately $270,000 in cash was found in the Defendant's garage. Written paper evidence in the Defendant's handwriting was found which included the "splits" note and index cards with addresses, times, and other armored car numbers written on them. The wiretap conversations also disclose that the Defendant was involved in the robbery. Mr. Greenham, a co-defendant, has testified at the aggravation/mitigation sentencing hearing that the Defendant is the one who shot and killed Mr. Magoch. Finally, the Court agrees with the State that the crime of armed robbery, and especially this armed robbery, is unquestionably a crime which carries with it a grave risk of death.

Accordingly, this Court concludes that the death penalty remains at this point in the analysis a legal sentence for the Court to impose on Count I.

AGGRAVATION-STATUTORY

(1) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(1), that is, that the Defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

(2) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(2), that is, that the Defendant was previously convicted of a serious offense, whether preparatory or completed.

(3) The Court finds that the state has not proved the existence of statutory aggravating circumstance (F)(3), that is, that in the commission of the offense the Defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

(4) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(4), that is, that the Defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(5) As to statutory aggravating circumstance (F)(5), the Court finds beyond a reasonable doubt that the Defendant committed the offense in expectation of the receipt of anything of pecuniary value.

The evidence clearly shows beyond a reasonable doubt that Mr. Magoch was killed in order to obtain the approximately one-half million dollars in cash in the armored car. Taking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result.

(6) As to statutory aggravating circumstance (F)(6), the Court finds beyond a reasonable doubt that the Defendant committed the offense in an especially heinous, cruel or depraved manner.

For purposes of the application of this aggravating circumstance Arizona law provides that "cruelty" is the pain and suffering of the victim experienced prior to death, including mental distress. The terms "heinous" and "depraved" focus upon a defendant's state of mind at the time of the offense. The statute is phrased in the disjunctive and if any one of the three factors is found the circumstance is satisfied.

When determining whether a crime is especially heinous or depraved within the meaning of this statutory aggravating circumstance considerations include whether the perpetrator relished the murder. At the aggravation/mitigation sentencing hearing Mr. Greenham testified that the Defendant, while they were counting the loot taken from the robbery of Mr. Magoch, said to his confederates "you guys are forgetting something — you're forgetting to congratulate me on my shot". All the evidence shows beyond a reasonable doubt that this Defendant did not appreciate the seriousness of his conduct in shooting Mr. Magoch and by his statement in the presence of Mr. Greenham, in fact, took great liking or

enjoyment in his actions. The Court is mindful in determining the facts as to this statutory aggravating circumstance as well as in making its *Enmund-Tison* findings that Mr. Greenham's credibility as a witness is an issue and that Mr. Greenham's testimony regarding the statement is uncorroborated. The Court has had occasion to observe Mr. Greenham while testifying and accordingly to assess his believability concerning whether the Defendant in fact made the statement attributed to him above. The Court has considered Mr. Greenham's demeanor while testifying along with all the other evidence in the case and resolves that Mr. Greenham is credible regarding the Defendant being the shooter and the Defendant's statement. The statement — "you guys are forgetting something — you're forgetting to congratulate me on my shot" — shows an abhorrent lack of regard for human life and that the Defendant seemed to savor or enjoy the murder of Mr. Magoch.

(7) The Court finds that the State has not proved the existence of aggravating circumstance (F)(7), that is, that the Defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

(8) The Court finds that the State has not proved the existence of aggravating circumstance (F)(8), that is, that the Defendant has been convicted of one or more other homicides as defined in ARS Sec. 13-1101, which were committed during the commission of the offense.

(9) The Court finds that the State has not proved the existence of aggravating circumstance (F)(9), that is, that the Defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age or was seventy years of age or older.

(10) The Court finds that the State has not proved the existence of statutory aggravating circumstance (F)(10), that is, that the murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the Defendant knew, or should have known, that the victim was a peace officer.

MITIGATION-STATUTORY

(1) The Court finds that statutory mitigating circumstance (G)(1), that is, that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution has not been proved by a preponderance of the evidence and does not exist.

(2) The Court finds that statutory mitigating circumstance (G)(2), that is, that the Defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution has not been proved by a preponderance of the evidence and does not exist.

(3) The Court finds that statutory mitigating circumstance (G)(3), that is, that the Defendant was legally accountable for the conduct of another under the provisions

of ARS Section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution has not been proved by a preponderance of the evidence and does not exist.

(4) The Court finds that statutory mitigating circumstance (G)(4), that is, that the Defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the Defendant was convicted would cause, or would create a grave risk of causing, death to another person has not been proved by a preponderance of the evidence and does not exist.

(5) The Court finds that statutory mitigating circumstance (G)(5), that is, whether the Defendant's age at the time of the offense is a mitigating circumstance has not been proved by a preponderance of the evidence and does not exist.

MITIGATION-NONSTATUTORY

The Court finds that the Defendant's minimal criminal record is a nonstatutory mitigating circumstance.

Beyond that, the Defendant has not proven the existence of any other nonstatutory mitigating circumstances by a preponderance of the evidence and accordingly none exist. This Court rejects that the Defendant has proved by a preponderance of the evidence that Mr. Greenham, and not the Defendant, was the shooter or that the Defendant was not at the scene of the robbery/murder regardless of who else may have been present and shot Mr. Magoch.

The Court has now weighed the aggravating and mitigating circumstances found to exist. This Court has considered statutory aggravating circumstances (F)(5) and (F)(6) which were proved beyond a reasonable doubt and found to exist and concludes that there are no mitigating circumstances sufficiently substantial to call for leniency. The Court specifically notes that had the State proved beyond a reasonable doubt only statutory aggravating circumstance (F)(5) that there remains still no mitigating circumstances sufficiently substantial to call for leniency. This was a cold-blooded, very calculated and premeditated murder to facilitate the robbery of thousands and thousands of dollars. The evidence is overwhelming that the Defendant was a principal, chief participant in the whole scheme.

Accordingly, as to Count I, Murder in the First Degree, it is the judgment and sentence of the court that the defendant, Timothy Stuart Ring, be sentenced to death in the manner set forth in ARS Sec. 13-704.

Dated this 29th day of October, 1997.

s/ Gregory H. Martin
The Hon. Gregory H. Martin

APPENDIX C — RELEVANT STATUTES

A.R.S. § 13-703

§ 13-703. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definitions

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed.

The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. A victim may submit a written victim impact statement, an audio or video tape statement or make an oral impact statement to the probation officer preparing the presentence report for the probation officer's use in preparing the presentence report. The probation officer shall consider and include in the presentence report the victim impact information regarding the murdered person and the economical, physical and psychological impact of the murder on the victim and other family members. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding.

Appendix C

The victim has the right to be present and to testify at the hearing. The victim may present information about the murdered person and the impact of the murder on the victim and other family members. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section. In evaluating the mitigating circumstances, the court shall consider any information presented by the victim regarding the murdered person and the impact of the murder on the victim and other family members. The court shall not consider any recommendation made by the victim regarding the sentence to be imposed.

E. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Appendix C

F. the court shall consider the following aggravating circumstances:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.

10. The murdered person was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

G. The court shall consider as mitigating circumstances any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his

participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

H. As used in this section:

1. "Serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

(a) First degree murder.

(b) Second degree murder.

(c) Manslaughter.

(d) Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Robbery.

(i) Burglary in the first degree.

(j) Kidnapping.

(k) Sexual conduct with a minor under fifteen years of age.

2. "Victim" means the murdered person's spouse, parent, child or other lawful representative, except if the spouse, parent, child or other lawful representative is in custody for an offense or is the accused.

* * *

A.R.S. § 13-1105

§ 13-1105. First degree murder; classification

A. A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another with premeditation.

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, marijuana

offenses under § 13-3405, subsection A, paragraph 4, dangerous drug offenses under § 13- 3407, subsection A, paragraphs 4 and 7, narcotics offenses under § 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13-3409, kidnapping under § 13-1304, burglary under § 13-1506, 13-1507 or 13-1508, arson under § 13-1703 or 13-1704, robbery under § 13-1902, 13-1903 or 13-1904, escape under § 13-2503 or 13-2504, child abuse under § 13- 3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under § 28-622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

B. Homicide, as prescribed in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703.

* * * *

No. 01–488

Supreme Court, U.S.
FILED
NOV 5 2001
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IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY STUART RING,
PETITIONER,

-VS-

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Should this Court overrule *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047 (1990), in which this Court held that Arizona's capital sentencing statute (providing for judge-sentencing) is constitutional?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASON FOR DENYING THE WRIT

ARIZONA'S CAPITAL SENTENCING STATUTE IS CONSISTENT WITH THE SIXTH AMENDMENT AND THIS COURT'S DECISIONS IN *WALTON V. ARIZONA*, *APPRENDI V. NEW JERSEY*, AND *JONES V. UNITED STATES*. 6

CONCLUSION 17

APPENDIX A A-1

TABLE OF AUTHORITIES

CASES PAGE

Almendarez-Torres v. United States,
523 U.S. 224, 118 S. Ct. 1219 (1998) 11

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348 (2000) 6-11, 15-17

Buchanan v. Angelone, 522 U.S. 269, 118 S. Ct. 757 (1998) 14

Jones v. United States,
526 U.S. 227, 119 S. Ct. 1215 (1999) 6, 7,11

Loving v. United States, 517 U.S. 748, 116 S. Ct. 1737 (1996) .. 13

Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546 (1988) 14

Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976) 13

State v. Harrod, __ Ariz. __, 26 P.3d 492 (2001) 8

State v. Perez Lara, 170 Ariz. 203, 823 P.2d 70 (App. 1990) 8

State v. Ring, __ Ariz. __, 25 P.2d 1139 (2001) .. 1, 2, 5-7, 9, 11, 12

State v. Wagner, 194 Ariz. 310, 982 P.2d 270 (1999) 11

State v. West, 176 Ariz. 432, 862 P.2d 192 (1993) 12, 14

United States v. Lombard, 72 F.3d 170 (1st Cir. 1995) 13

Walton v. Arizona,
497 U.S. 639, 110 S. Ct. 3047 (1990) 6-12, 14-16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 3, 11, 13, 14, 16

U.S. Const. amend. VIII 3, 13-17

U.S. Const. amend. XIV, § 1 3

U.S. Const. art. III, § 2 2

STATUTES

28 U.S.C. § 1254(1) 2

A.R.S. § 13–702(B) 3, 12

A.R.S. § 13–703 3

A.R.S. § 13–703(A) 9

A.R.S. § 13–703(B) 6

A.R.S. § 13–703(F) 14

A.R.S. § 13–1105 ..... 3, 9
A.R.S. § 13–1105(C) 9

OPINION BELOW

Petitioner is a death-row inmate who seeks review of the Arizona Supreme Court's affirmance of his death sentence, as published in *State v. Ring*, 200 Ariz. 267, 25 P.3d 1139 (2001).

STATEMENT OF JURISDICTION

Petitioner requests this Court to review the decision of the Arizona Supreme Court in *State v. Ring*. The Arizona Supreme Court issued its decision on June 20, 2001. Petitioner timely filed the petition for writ of certiorari on or about September 18, 2001. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2, and 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . .

Arizona Revised Statutes §§ 13–703, 13–1105, and 13–702(B) are reproduced in Appendix A.

STATEMENT OF THE CASE

Petitioner and accomplices James "Yoda" Greenham and William Ferguson murdered John Magoch, an armored truck driver, in November, 1994. Petitioner killed Magoch by shooting him in the head from a distance, using a rifle. The murder occurred while the armored vehicle was parked in front of a department store. Petitioner fired the shot as the victim sat in the driver's seat, waiting for his co-worker to return with a pick up from the department store. The murderers absconded with the armored vehicle, followed by Petitioner's pickup truck. The conspirators abandoned the armored vehicle in a church parking lot later in the day, after removing checks, coins, and nearly $563,000 in United States currency. They left the victim's body in the vehicle.

Petitioner had worked as a part-time driver for the Loomis Armored Car Company in 1988 and 1989; he was a championship caliber marksman; he had known Ferguson, a former Phoenix Police Officer, since 1989. He met Greenham in 1993, when both men were working as corrections officers in the Arizona State Prison system.

The jury convicted Petitioner of first-degree murder, conspiracy to commit armed robbery, armed robbery, first-degree burglary, and theft.

At the pre-sentence hearing, Greenham testified to the details of the crime, and stated that Petitioner was the leader who set forth the tactics they would employ. After killing John Magoch and absconding with the armored vehicle, the three accomplices stopped at the church parking lot and transferred the money into Petitioner's truck. They divided the cash the day after the murder, with Ferguson taking his own share and Petitioner holding his own and Greenham's shares in Petitioner's duffel bag. Greenham would go to Petitioner's house whenever he needed money. Greenham also testified that no one was involved in the robbery other than he, Petitioner, and Ferguson.

The trial court sentenced Petitioner to death on the first-degree murder conviction after finding two aggravating circumstances: (1)

pecuniary gain; and (2) the offense was committed in an especially heinous or depraved manner. The trial court found, as a non-statutory mitigating circumstance, Petitioner's "minimal criminal record," but concluded that it was not sufficiently substantial to call for leniency. The trial court imposed prison sentences on the other convictions.

Petitioner appealed to the Arizona Supreme Court. He argued among other things that Arizona's capital sentencing statute violated the Sixth Amendment. Specifically, Petitioner asserted that he had the right to have a jury (1) make factual findings on aggravating and mitigating evidence, and (2) determine whether to impose death or life imprisonment based on those findings. On June 20, 2001, the Arizona Supreme Court affirmed Petitioner's convictions and sentences, specifically rejecting Petitioner's Sixth Amendment argument. *State v. Ring*, 200 Ariz. 267, ¶¶ 40–44, 65, 25 P.3d 1139 (2001). The Supreme Court struck the aggravating factor of heinous or depraved and affirmed the death sentence after independently re-weighing the remaining aggravating circumstance of pecuniary gain against the minimal mitigation: "This murder was not the result of sudden impulse or loss of control nor a robbery gone bad, but a planned, ruthless robbery and killing." *Id.* at ¶ 63. Petitioner now seeks review of that ruling in his Petition for a Writ of Certiorari, docketed in this Court on September 20 as Case No. 01–488.

REASON FOR DENYING THE WRIT

ARIZONA'S CAPITAL SENTENCING STATUTE IS CONSISTENT WITH THE SIXTH AMENDMENT AND THIS COURT'S DECISIONS IN *WALTON V. ARIZONA*, *APPRENDI V. NEW JERSEY*, AND *JONES V. UNITED STATES*.

I. This Court Has Already Determined that It Need Not Revisit *Walton* Based on Apprendi or *Jones*.

There is no compelling reason to grant a writ of certiorari in this case. No conflict exists between the Arizona Supreme Court's decision and the decision of another state court of last resort. No conflict exists between the Arizona Supreme Court's decision and any decision of a United States court of appeals. The Arizona Supreme Court did not decide an unsettled question of federal law. To the contrary, the Arizona Supreme Court determined in Petitioner's case that it was bound by this Court's pronouncements on this issue, and that it was constrained under the supremacy clause from adopting Petitioner's position because to do so would conflict with this Court's decisions. *State v. Ring*, 200 Ariz. 267 at ¶ 44, 25 P.3d 1139.

In *Walton v. Arizona*, 497 U.S. 639, 647–48, 110 S. Ct. 3047 (1990), this Court upheld Arizona's capital sentencing scheme, which provides that the trial court, rather than the jury, determines whether a sentence of death is appropriate, based upon a consideration of aggravating and mitigating factors as determined by the court in the sentencing proceedings. *See* A.R.S. § 13–703(B). This Court has expressly stated that *Jones* and *Apprendi* have not overruled *Walton*. Contrary to Petitioner's contention, the Court's recent decisions in *Apprendi* and *Jones* do not suggest that the *Walton* decision should be reexamined.

In deciding *Apprendi v. New Jersey*, 530 U.S. 466, 496–97, 120 S. Ct. 2348, 2366 (2000), and *Jones v. United States*, 526 U.S. 227, 250–51, 119 S. Ct. 1215, 1227–28 (1999), this Court anticipated the issue Petitioner is presenting and ruled on it. Indeed, a minority of

justices dissented from the ruling on this issue in both cases. *Apprendi*, 530 U.S. at 536–38, 120 S. Ct. at 2387–88; *Jones*, 526 U.S. at 271–72, 119 S. Ct. at 1238. The Arizona Supreme Court unanimously recognizes its duty to follow the majority opinions in *Jones* and *Apprendi*. *Ring*, 200 Ariz. 267, at ¶¶ 40–44, 25 P.3d 1139. Petitioner demonstrates that disagreement exists among jurists on this issue. But the existence of disagreement does *not* mean the issue is unsettled. Petitioner is merely adopting and re-urging the dissent's position in *Apprendi*.

In *Jones*, this Court interpreted the federal car jacking statute:

> This case turns on whether the federal car-jacking statute, 18 U.S.C. § 2119, as it was when petitioner was charged, defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.

Jones, 526 U.S. at 230, 119 S. Ct. at 1217. The majority ultimately resolved that question in favor of finding three separate offenses. *Id.* However, *Jones* did not overrule *Walton*. Justice Souter, writing for the majority, said:

> It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution.

526 U.S. at 248, 119 S. Ct. at 1226. Indeed, Justice Souter expressly distinguished *Walton*:

> There [in *Walton*], the Court described statutory specifications of aggravating circumstances in capital sentencing as "standards to guide the . . . choice between the alternative verdicts of death and life imprisonment. . . ." The Court thus characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a

> greater and lesser penalty, not as a process of raising the ceiling of the sentencing range available. . . .

Id. at 251, 119 S. Ct. at 1228.

Likewise, the Court's decision in *Apprendi* expressly reaffirms *Walton*:

> Finally, *this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges*, after a jury verdict holding a defendant guilty of a capital crime, *to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona*, 497 U.S. 639, 647–649 (1990).

530 U.S. at 496, 120 S. Ct. at 2366 (emphasis added). Thus, there is no unsettled question.

II. Petitioner's Argument Rests on the Erroneous Premise that the Death Sentence is Beyond the Prescribed Maximum Penalty in the Range of Sentencing.

Apprendi does not apply to a court's determination of aggravating circumstances. Petitioner fails to recognize the distinction between sentence enhancement and aggravation under Arizona law, and that failure undermines his argument. Stated simply, enhancement raises the permissible range of punishment, while aggravation elevates a sentence within the previously defined range. *State v. Perez Lara*, 170 Ariz. 203, 206 at n. 2, 823 P.2d 70, 73 (App. 1990).

Unlike the situation in *Apprendi*, the trial court's finding of aggravating circumstances does not increase the "statutory maximum" sentence under Arizona's capital sentencing scheme. First degree murder is a capital offense under Arizona law. *State v. Harrod*, 200 Ariz. 309, ¶ 43, 26 P.3d 492 (2001). Consequently, as this Court stated in *Apprendi*, Petitioner "is *charged* with actions that expose him to the

death penalty," and his right to a jury trial extends to "all the elements of the charge." 530 U.S. at 497, 120 S. Ct. at 2366 (emphasis supplied). The guilty verdict exposed Petitioner to a death sentence because the statutory range of sentences for first-degree murder is "death or life imprisonment." A.R.S. § 13–1105(C); *see also* A.R.S. § 13–703(A) ("A person guilty of first degree murder as defined in section 13–1105 shall suffer death or imprisonment in the custody of the state department of corrections for life ... If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life."). Death is thus the "prescribed statutory maximum" sentence for this offense, and a death sentence does not extend the range of sentencing. *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2363.

Petitioner miscasts the question as "whether the Sixth Amendment right to a jury determination of facts that increase the available range of punishment for criminal defendants subject to a term of imprisonment applies as well to defendants subject to the penalty of death." Petition at 2 (emphasis omitted). The undisputed answer to that question is yes, as *Apprendi* makes clear. The underlying problem is that Petitioner's question presumes that a death sentence is *beyond* Arizona's prescribed maximum statutory penalty for first degree murder, when in fact it *is* the prescribed maximum penalty. That is a point upon which the majority and minority differed in *Apprendi*. Petitioner has reached the end of the road: he cannot overcome *Walton*, *Apprendi*, and the plain language of the Arizona capital sentencing statutes.

Petitioner, however, does not stop driving where the road ends. He tries to convince this Court that the Arizona statutes do not *really* mean what they say—that "[f]irst degree murder is punishable by death or life imprisonment as provided by section 13–703," and that a death sentence exceeds the statutory range of punishment. Toward that end, Petitioner takes the Arizona Supreme Court's agreement with the *dissent* in *Apprendi* and treats it as an "authoritative" change in the law that renders *Walton*'s construction "mistaken." The legislature did not amend the Arizona capital sentencing statute. The *State v. Ring*

majority does nothing more than endorse and restate the dissent's position in *Apprendi*. Justice O'Connor's dissent in *Apprendi* states:

> A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.

530 U.S. at 538, 120 S.Ct. at 2388. The majority opinion of the Arizona Supreme Court stated in Petitioner's appeal that "the present case is precisely as described in Justice O'Connor's dissent - Defendant's death sentence required the judge's factual findings." 200 Ariz. 267, at ¶ 43, 25 P.3d 1139. The court employed Justice O'Connor's framework in characterizing the "range of punishment," stating:

> In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release.

Id. at ¶ 42. The Arizona Supreme Court's discussion of *Apprendi* does not call into question this Court's interpretation of Arizona law in *Walton*. Nor does that discussion create a basis for finding that *Apprendi* has overruled *Walton*:

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The

> person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Apprendi, 530 U.S. at 497, 120 S. Ct. at 2366 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257, n. 2, 118 S. Ct. 1219 (1998) (Scalia, J., dissenting)).

The Arizona Supreme Court's alternative understanding of the "range of sentencing" has no Sixth Amendment consequences, as that court implicitly conceded by affirming Petitioner's sentence. *Ring*, 200 Ariz. 267, at ¶ 44, 25 P.3d 1139. The Arizona statute upheld in *Walton* remains materially unchanged, and so has this Court's determination of what a "range of sentencing" means for Sixth Amendment purposes:

> the finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and a lesser penalty, not ... a process of raising the ceiling of the sentencing range available.

Jones, 526 U.S. at 251, 119 S. Ct. at 1228 (characterizing the holding in *Walton*).

The Arizona Supreme Court's use of the term "sentencing range" in deciding Petitioner's appeal created a semantic distinction, not a legal one. That becomes obvious in light of that court's recent rejection of a vagueness challenge to the capital sentencing statute:

> Arizona's statute ... [A.R.S. § 13–703(A)] states with clarity that *the punishment for committing first degree murder is either death, natural life, or life in prison with the possibility of parole*. Thus, a person of ordinary intelligence can easily determine the *range of punishment* he or she faces for committing first degree murder.

State v. Wagner, 194 Ariz. 310, 313, 982 P.2d 270, 273 (1999) (emphasis supplied). The Arizona Supreme Court has also implicitly

recognized that statutory aggravating and mitigating factors do not extend the sentencing range in capital cases:

> Defendant ... argues that the equal protection clause also demands that a jury make the determination [whether aggravating factors exist], because in Arizona certain noncapital defendants are entitled to a jury determination of sentence enhancement factors. *See* A.R.S. § 13–604(K). Notwithstanding the fact that *sentence enhancement and aggravation are different*, compare A.R.S. § 13–604(K) with A.R.S. §§ 13–702, 13–703, this precise argument has also been rejected by the Ninth Circuit Court of Appeals.

State v. West, 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993) (Citations omitted). Thus, Petitioner errs in concluding that Arizona law changed in the appeal of his case, and that *Walton* now "rests on a mistaken construction of Arizona law."

Petitioner also fails to appreciate the broader consequences of treating the sentencing range as the array of sentences a court can impose "solely on the basis of the jury's verdict." *See Ring*, 200 Ariz. 267, at ¶ 42, 25 P.3d 1139. Under current Arizona law in non-capital cases, judges would lose the discretion to aggravate or mitigate a sentence, because only a presumptive sentence would be lawful based on the verdict alone. A.R.S. § 13–702(B). The legislature would have to make radical changes to capital and non-capital sentencing statutes alike, displacing sentencing hearings with second trials where juries consider all of the aggravation and mitigation evidence. That scenario does not comport with this Court's past pronouncements on the subject of judicial sentencing, or with sentencing in federal criminal cases under the Federal Sentencing Guidelines:

> As now-Justice Breyer noted, the Guidelines evince a compromise between a pure "charge offense" system in which sentences are determined based solely upon conduct of which a defendant is convicted, and a "real offense" system, in which sentences are fashioned in view of all relevant mitigating and

> aggravating factors surrounding the defendant's conduct. A sentencing court may, therefore, consider relevant conduct of the defendant for purposes of making Guidelines determinations, even if he has not been charged with--and indeed, even if he has been acquitted of--that conduct, so long as the conduct can be proved by a preponderance of the evidence.

United States v. Lombard, 72 F.3d 170, 176 (1st Cir. 1995) (internal citations omitted). It also loses sight of the need for consistency, particularly in capital cases:

> [J]udicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt v. Florida, 428 U.S. 242, 252, 96 S. Ct. 2960, 2967 (1976) (plurality opinion).

III. Petitioner Fails to Distinguish the Eighth Amendment Requirement of Finding Aggravating Factors from the Sixth Amendment Requirement that a Jury Find the Defendant Guilty of a Capital Offense.

Aside from the fact that death *is* the statutory prescribed maximum sentence for first-degree murder under Arizona law, it is the *Eighth*—rather than the *Sixth*—Amendment that requires a finding of one or more statutory aggravating circumstances in order to impose the death sentence. *Loving v. United States*, 517 U.S. 748, 755, 116 S. Ct. 1737, 1742 (1996) (Eighth Amendment requires capital sentencing scheme to genuinely narrow class of persons eligible for death penalty and reasonably justify imposition of more severe sentence on defendant compared to others found guilty of murder; can be accomplished by requiring sentencer to find at least one aggravating factor).

There is a significant difference between *Sixth* Amendment eligibility for a sentencing range that *includes* death, and *Eighth* Amendment eligibility for the death penalty. Sixth Amendment eligibility requires only that a defendant be convicted of first-degree murder. Eighth Amendment eligibility requires the finding of an aggravating circumstance under A.R.S. § 13-703(F). Like most states, Arizona narrows the class of death-eligible killers during the penalty phase by requiring the sentencer (trial judge) to find one or more statutory aggravating circumstance. *West*, 176 Ariz. at 449, 862 P.2d at 209; *see also Buchanan v. Angelone*, 522 U.S. 269, 118 S. Ct. 757 (1998) (narrowing function performed during eligibility phase of capital sentencing proceeding "often through consideration of aggravating circumstances"); *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S. Ct. 546 (1988) (most states perform narrowing function by requiring the finding of at least one aggravating circumstance). Indeed, in *Walton* the Court expressly noted that aggravating circumstances are not "elements of the offense," but are determinations that distinguish killers suitable for execution under the Eighth Amendment:

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations", while in Arizona they are "elements of the offense." But as we observed in *Poland v. Arizona*, 476 U.S. 147, 106 S. Ct 1749, 90 L.Ed.2d 123 (1986), an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty)." *Id.* at 156, 106 S. Ct., at 1755 (citation omitted).

497 U.S. at 648, 110 S. Ct. at 3054.

In his concurring opinion in *Apprendi*, Justice Thomas espoused the view that the majority in *Apprendi* did not go far enough. Under the rule Justice Thomas proposed, joined by Justice Scalia, *any* sentence enhancement factor (even if the enhancement did not exceed the statutory maximum set by the legislature) would have to be found by a jury. 530 U.S. at 499-523, 120 S. Ct. at 2367–80 (Thomas, J., concurring). However, Justice Thomas noted that even the "broader rule" he espoused would likely have no effect on the Court's holding in *Walton*, or capital sentencing schemes in general:

> Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona*, 497 U.S. 639, 647–649, 110 S. Ct. 3047, 111 L.Ed.8d 511 (1990). See *ante*, at 2365–2366. *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for *in the area of capital punishment unlike any other area*, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, *neither Arizona nor any other jurisdiction could provide—as, previously, it freely could and did—that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment.* Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day.

Id. at 522–23, 120 S. Ct. at 2380 (emphasis added, footnote omitted).

Petitioner's reliance upon Justice O'Connor's dissenting opinion in *Apprendi* is misplaced in this regard. This Court has repeatedly stated that the *Eighth* Amendment requirements determining death eligibility

do not implicate the *Sixth* Amendment. Again, in *Walton* the Court noted the distinction:

> Our holding in *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L.Ed.2d 704 (1986), provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982), finding—that the defendant killed, attempted to kill, or intended to kill—in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense.'" 474 U.S., at 385, 106 S. Ct., at 696 (citations omitted), and that "while the *Eighth Amendment* prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Id.*, at 385, n. 3, 106 S. Ct., at 385, n. 3. *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." 474 U.S. at 386, 106 S. Ct., at 697. *If the Constitution does not require that the Enmund finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.*

497 U.S. at 648–49, 110 S. Ct. at 3054–55 (emphasis added).

Justice O'Connor wrote in her *Apprendi* dissent that, under Arizona law, "If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment." 530 U.S. at 537, 120 S. Ct. at 2387. That is true, for *Eighth* Amendment purposes, but it is irrelevant for *Sixth* Amendment purposes. The distinction is crucial and dispositive. Because under Arizona law "death" *is* the "statutory maximum" sentence for first-degree murder, and because the trial court's findings of aggravating circumstances determine death eligibility under the

Eighth Amendment, the rationale of *Apprendi* is inapplicable to Arizona's capital sentencing scheme.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

A.R.S. § 13–703 (1993)
(in effect at Petitioner's sentencing by the trial court)

A. A person guilty of first degree murder as defined in § 13–1105 shall suffer death or imprisonment in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section. If the court imposes a life sentence, the court may order that the defendant not be released on any basis for the remainder of the defendant's natural life. An order sentencing the defendant to natural life is not subject to commutation or parole, work furlough or work release. If the court does not sentence the defendant to natural life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13–1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for

the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a serious offense, whether preparatory or completed.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13–1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was

under fifteen years of age or was seventy years of age or older.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13–303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

H. As used in this section, "serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:

1. First degree murder.

2. Second degree murder.

3. Manslaughter.

4. Aggravated assault resulting in serious physical injury or committed by the use, threatened use or exhibition of a deadly weapon or dangerous instrument.

5. Sexual assault.

6. Any dangerous crime against children.

7. Arson of an occupied structure.

8. Robbery.

9. Burglary in the first degree.

10. Kidnapping.

11. Sexual conduct with a minor under fifteen years of age.

A.R.S. § 13–1105 (1994)
(in effect when Petitioner murdered John Magoch)

A. A person commits first degree murder if:

1. Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation; or

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under § 13–1405, sexual assault under § 13–1406, molestation of a child under § 13–1410, marijuana offenses under § 13–3405, subsection A, paragraph 4, dangerous drug offenses under § 13–3407, subsection A, paragraph 7, narcotics offenses under § 13–3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13–3409, kidnapping under § 13–1304, burglary under § 13–1506, 13–1507 or 13–1508, arson under § 13–1703 or 13–1704, robbery under § 13–1902, 13–1903 or 13–1904, escape under § 13–2503 or 13–2504, child abuse under § 13–3623, subsection B, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under § 28–622.01 and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

B. Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.

C. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13–703.

A.R.S. § 13–702(B) (2000)

The upper or lower term imposed pursuant to Sec. 13–604, 13–604.01, 13–604.02, 13–702.01 or 13–710 or subsection A of this section may be imposed only if the circumstances alleged to be in aggravation or mitigation of the crime are found to be true by the trial judge upon any evidence or information introduced or submitted to the court prior to sentencing or any evidence previously heard by the judge at the trial, and

factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

ARGUED
APR 22 2002

Supreme Court, U.S.
FILED
NOV 8 2002
CLERK

No. 01-488

IN THE

Supreme Court of the United States

DISTRIBUTED
MAY 7 2002

TIMOTHY STUART RING,

Petitioner.

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

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5pp

The Petition presents the question of whether the Sixth Amendment right to a jury determination of facts that increase the available range of punishment for criminal defendants subject to a term of *imprisonment* applies as well to defendants subject to the penalty of *death*. The Brief in Opposition concedes that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "makes clear" that the answer to that question must be "yes." Br. in Opp. at 9. Thus, even the State cannot articulate any justification for maintaining the irrational disjunction between the Sixth Amendment protections available in non-capital cases and those available in capital cases that will persist until this Court overrules *Walton v. Arizona*, 497 U.S. 639 (1990).

The Brief in Opposition does not contest that this case implicates a broadly important and pressing issue as to which this Court's review is warranted. Rather, the State contents itself with arguing that the principles of *Apprendi* do not require that this Court's decision in *Walton* be overruled. We respond to these arguments — which go to the merits of this case, and not to the issue of whether certiorari should be granted — briefly below.

1.a. The Petition argued that *Apprendi* placed the continued viability of *Walton* in grave doubt, that the issue presented is one of broad constitutional importance, that a prompt resolution of this issue would substantially mitigate the burdens that this continuing doubt places upon legislatures, courts, and capital defendants, and that there are no countervailing reasons for the Court to postpone its resolution of this issue for a future Term. Pet. at 8-15. The Brief in Opposition does not effectively contest any of these points, but instead focuses primarily on an argument better devoted to a brief on the merits — that *Walton* was correctly decided and has not been undermined by *Apprendi*. While we disagree with that argument, we note that the Brief

in Opposition thus effectively concedes the Petition's central point — that this case presents issues of nationwide importance upon which this Court's guidance is urgently required.

1.b. Although portions of the Brief in Opposition briefly address matters related to the decision whether to grant or deny certiorari, the Brief in Opposition does not undermine the arguments presented on this question in the Petition, nor does it identify any valid concerns weighing against the grant of certiorari.

The Brief in Opposition points out, for example, that no conflict or "unsettled question" is present here. Br. in Opp. at 6. It is of course common ground, however, that no conflict or unsettled question may exist while *Walton* remains controlling authority. Pet. at 14-15. Similarly, the Brief in Opposition observes that this Court has not overruled *Walton*. Br. in Opp. at 6, 7, 10. Again, there is no contest on this point — if the Court had done so, there would be no need for petitioner to request that *Walton* be overruled now. The Brief in Opposition also attacks the notion that Arizona law has changed since *Walton* (Br. in Opp. at 9-10, 12), but the Petition did not assert that it had. Rather, the Petition noted that the decision here of the Arizona Supreme Court, which is the final expositor of Arizona law (*Brady v. Maryland*, 373 U.S. 83, 90 (1963)), *clarifies* that pursuant to that law, a judge does in fact "determine the existence of a factor which makes a crime a capital offense." *Apprendi*, 530 U.S. at 497 (internal quotation marks omitted).

The Brief in Opposition further asserts that this Court "expressly reaffirm[ed]" *Walton* in *Apprendi*. Br. in Opp. at 8. But the passage in question simply set forth an observation concerning this Court's holding in *Walton*, followed by the statement that that holding was "not controlling" with

reference to the non-capital hate-crime law before the Court. *Apprendi*, 530 U.S. at 496. The Brief in Opposition does not explain why these observations should be construed as an "express reaffirmance" of *Walton*'s holding. Finally, the Brief in Opposition argues that the Court should deny certiorari in light of the "broader consequences" that a decision on the question presented here would have in the non-capital context. Br. in Opp. at 12. This suggestion is perplexing, not only because an issue's broad significance is a reason to *grant* certiorari, Sup. Ct. R. 10, but also because the broader effects to which the State refers are already implicated by the *Apprendi* decision, which was made in the non-capital context. *See, e.g., United States v. Promise*, 255 F.3d 150, 156-67 (4th Cir.), *petition for cert. filed*, (U.S. Sep. 20, 2001) (No. 01-6398) (en banc) (citing cases).

2. The Brief in Opposition concedes (Br. in Opp. at 9) that Arizona's capital sentencing scheme is subject to the Sixth Amendment principles identified in *Apprendi*, wherein this Court held that "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed" violates the defendant's Sixth Amendment right to a jury trial. *Apprendi*, 530 U.S. at 490 (internal quotation marks omitted). At the same time, the Brief in Opposition argues that a statutory sentence declaring that "[f]irst degree murder . . . is punishable by death or life imprisonment" (A.R.S. § 13-1105(C) (Pet. App. at 61a)) renders Arizona's capital sentencing scheme consistent with the Sixth Amendment mandate identified in *Apprendi*. *See* Br. in Opp. at 8-9. But this portion of Arizona's statutes simply has no effect upon the way in which capital sentencing is conducted in Arizona, and it certainly does not change the fact that Arizona's capital sentencing scheme "remove[s] from the jury the assessment of facts that increase the prescribed range of penalties" to

which a first degree murder defendant is exposed, to include the penalty of death. *Apprendi*, 530 U.S. at 490.[1]

The Brief in Opposition thus neither undermines the Petition's showing that this case presents an important issue as to which prompt resolution is appropriate, nor identifies any weakness in the Petition's argument on the merits of that issue.

CONCLUSION

For these reasons, and for the reasons articulated in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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---

1. The Brief in Opposition also stresses that "it is the *Eighth* — rather than the *Sixth* — Amendment that requires a finding of one or more statutory aggravating circumstances in order to impose a death sentence" (Br. in Opp. at 13), but it is unclear what relevance this observation has to the Petition. Petitioner does not allege that Arizona's capital sentencing statute lacks the necessary specification of aggravating circumstances, but rather that it authorizes a judge, rather than a jury, to the make the findings necessary to increase the available punishment from life imprisonment to death, and thus violates the Sixth Amendment mandate identified in *Apprendi*.

(6)

No. 01-488

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 18, 2001
CERTIORARI GRANTED JANUARY 11, 2002

122 PP

TABLE OF APPENDICES

Page

Appendix A — Relevant Docket Entries Of The Superior Court Of Arizona In Maricopa County 1a

Appendix B — Relevant Docket Entries Of The Arizona Supreme Court 4a

Appendix C — Indictment Dated February 24, 1995 ..... 8a

Appendix D — Notice Of Supervening Indictment Dated February 28, 1995 ..... 14a

Appendix E — Jury Instructions 17a

Appendix F — State's Notice Of Aggravating Factors And Witnesses Dated December 10, 1996 ..... 31a

Appendix G — Excerpts of Presentence Hearing In The Superior Court Of The State Of Arizona In And For The County Of Maricopa Dated October 9, 1997 ..... 34a

The following opinion and special verdict and relevant statutes have been omitted in printing this joint appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

Page

Opinion Of The Supreme Court Of The State Of Arizona Dated June 20, 2001 ..... 1a

Special Verdict (Count I) Of The Superior Court Of The State Of Arizona In And For The County Of Maricopa Dated And Filed October 29, 1997 ... 45a

Relevant Statutes:
A.R.S. § 13-703 ..... 54a
A.R.S. § 13-1105 ..... 60a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY

CASE DOCKET FOR CASE CR95-01754 -001
AS OF 02/13/2002

* * *

PARTIES

Party No.	Party Name	Relationship	Sex
001	STATE OF ARIZONA ATTORNEY 006432 DAVID A/POWELL	PLA	N
002	GRAND JURY ATTORNEY PROPER	IMO	N
003	TIMOTHY STUART RING (A) ATTORNEY 007380 ROBERT W/DOYLE AKA — TIMOTHY S RING	DEF	M
004	JAMES HAROLD GREENHAM (B) AKA — JAMES H GREENHAM	DEF	M

Appendix A

005 WILLIAM ELWOOD FERGUSON II (C) DEF M
ATTORNEY 010617 WILLIAM/FOREMAN
AKA — WILLIAM E FERGUSON II
AKA — WILLIAM FERGUSON II
AKA — WILLIAM FERGUSON

* * *

File Date	Event Description Supplementary Description	Associated Parties
02/24/1995	INDICTMENT CT 1: MURDER 1ST DEG CL 1 DANGEROUS FEL CT 2: CONSPIRACY TO COMMIT MURDER 1ST DEG CL 1 DANGEROUS FEL OR IN ALTERNATIVE CONSPIRACY TO COMMIT ARMED ROBBERY CL 2 DANGEROUS FEL OR IN ALTERNATIVE CONSPIRACY TO COMMIT BURGLARY 1ST DEG CL 3 DANGEROUS FEL CT 3: ARMED ROBBERY CL 2 DANGEROUS FEL	9680 P1 (A-C)
02/24/1995	INDICTMENT CT 4: BURGLARY 1ST DEG CL 3 DANGEROUS FEL CT 5: THEFT CL 2 FEL DOC: ON OR ABOUT 11/28/94 DR 94-104851 GLENDALE PD	9680 P1 (A-C)
02/24/1995	ME: GJ NOT/SUPVENING INDICT	C (A-C)

* * *

Appendix A

02/27/1995	NOTICE OF SUPERVENING INDICTMT NO BOND/NI	9680 P1 (A)

* * *

03/28/1995	NOTICE OF INTENTION TO SEEK THE DEATH PENALTY	9680 P1 (A)

* * *

12/06/1996	JURY INSTRUCTIONS	C (A)

* * *

12/10/1996	NOTICE STATE'S RULE 15.1(G)/OF AGG FACTORS & WITS	9680 P1 (A)

* * *

10/29/1997	ME: SENTENCE IMPRISONMENT	C (A)

* * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE ARIZONA SUPREME COURT

Criminal Docket
Arizona Supreme Court

CASE NUMBER
CR-97-0428-AP

COURT NUMBER

RELATED CASE :
CofA NO. :
CofA TYPE :
LOWER COURT : Maricopa
LOWER CT NO. : CR-95-01754(A)
JUDGE : Gregory H. Martin
SENTENCE : Death

PARTY 1 DATA

NAME : **STATE OF ARIZONA**
Total : 1
TYPE : Appellee

PARTY 2 DATA

NAME : **TIMOTHY STUART RING**
Total : 1
TYPE : Appellant

Appendix B

Disposition	Citation
Affirmed	25 P.3d 1139 (Ariz. 2001); 200 Ariz 267

STAY REQUEST:	STAY ACTION:
FILED: 31-Oct-1997	RECORD COMPLETE: 22-Jun-1999
OPEN BRIEF/PETITION: 19-Jan-2000	SUP OB/X APP/X PET:
ANSWER/RESP: 19-Apr-2000	SUP ANSWER/RESP:
REPLY: 15-Jun-2000	SUP REPLY:
AT ISSUE: 15-Jun-2000	SUBMITTED ON BRIEFS:
OA Granted/Denied: 16-Jun-2000 G	
ORAL ARGUMENT: 7-Dec-2000 25	SUBMITTED: 7-Dec-2000
DECISION DATE: 20-Jun-2001	DECISION TYPE: OPINION
DECISION SUP:	DECISION SUP TYPE:
M/RECON:	RESP M/RECON:
MANDATE:	WARRANT:
CERT. PETITION: 18-Sep-2001	CERT. DECISION:
AGENDA:	
OB NOTICE REQ:	OB NOTICE SENT:
OA NOTICE REQ:	OA NOTICE SENT: S
PENDING: N	TERMINATION DATE: 10-Jul-2001

Appendix B

TICKLE DATE:

TICKLER:

COMMENTS:

CASE PROCEEDINGS

Item	Date/Init	Description
1	10/31/97 rs	Notice of Appeal [Appellant Ring] [Judgment filed on 10/29/97] [T 12/22/97]
2	10/31/97 rs	Notice of Appeal [Clerk, MCSC] [Judgment filed 10/30/97]
		* * *
28	1/19/00 cez	APPELLANT'S OPENING BRIEF [Appellant Ring]
		* * *
32	4/19/00 cez	APPELLEE'S ANSWERING BRIEF
		* * *
36	6/15/00 cez	APPELLANT'S REPLY BRIEF [Ring]
		* * *
43	12/07/00 ls	Oral Argument — Submitted for decision en banc [Attorneys who argued: Jon G. Anderson, Esq.; Robert W. Doyle, Esq.]

Appendix B

44	6/20/01 sls	OPINION — We affirm Defendant's convictions and sentences.
		* * *
45	9/25/01 dm	USSC Notice — Petition for Writ of Certiorari filed 9/18/01 [USSC No. 01-488]
46	1/22/02 dm	Letter from USSC: Petition for Writ of Certiorari granted 1/11/02. [USSC #01-488] [Suter, Clerk]
		* * *

APPENDIX C — INDICTMENT DATED FEBRUARY 24, 1995

DR. 94-104851 Glendale P.D.

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NO. CR95-01754

177 GJ 304

STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY STUART RING	(A)
JAMES HAROLD GREENHAM	(B)
WILLIAM ELWOOD FERGUSON II	(C)

Defendants.

INDICTMENT

COUNT 1: MURDER FIRST DEGREE, A CLASS 1 DANGEROUS FELONY
COUNT 2: CONSPIRACY TO COMMIT MURDER FIRST DEGREE, A CLASS 1 DANGEROUS FELONY OR IN THE ALTERNATIVE CONSPIRACY TO COMMIT ARMED ROBBERY, A CLASS 2 DANGEROUS FELONY OR IN THE ALTERNATIVE CONSPIRACY TO COMMIT BURGLARY FIRST DEGREE, A CLASS 3 DANGEROUS FELONY

Appendix C

COUNT 3: ARMED ROBBERY, A CLASS 2 DANGEROUS FELONY
COUNT 4: BURGLARY FIRST DEGREE, A CLASS 3 DANGEROUS FELONY
COUNT 5: THEFT, A CLASS 2 FELONY

The Grand Jurors of Maricopa County, Arizona, accuse TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on this 24th day of February, 1995, charging that in Maricopa County, Arizona:

COUNT 1:

TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or about the 28th day of November, 1994, knowing that their conduct would cause death, with premeditation caused the death of John Magoch and/or acting either alone or with one or more other persons, committed or attempted to commit Armed Robbery and/or Burglary First Degree and in the course of and in furtherance of such offense, or immediate flight from such offense, TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II or another person caused the death of John Magoch, in violation of A.R.S. §§ 13-1101, 13-1105, 13-301, 13-302, 13-303, 13-304, 13-703, 13-801 and 13-812.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a gun, a deadly weapon or dangerous instrument, in violation of A.R.S. § 13-604(P).

Appendix C

COUNT 2:

TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or before the 28th day of November, 1994, with the intent to promote or aid the commission of an offense, to-wit: Murder First Degree, agreed with one or more persons, that at least one of them or another would engage in conduct constituting the offense of Murder First Degree in violation of A.R.S. 13-1101, in violation of A.R.S. §§ 13-1003, 13-1101, 13-1105, 13-301, 13-302, 13-303, 13-304, 13-701, 13-801 and 13-812.

OR IN THE ALTERNATIVE: TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or before the 28th day of November, 1994, with the intent to promote or aid the commission of an offense, to-wit: Armed Robbery, agreed with one or more persons, that at least one of them or another would engage in conduct constituting the offense of Armed Robbery in violation of A.R.S. 13-1904, in violation of A.R.S. §§ 13-1003, 13-1904, 13-1901, 13-1902, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-801 and 13-812.

OR IN THE ALTERNATIVE: TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or before the 28th day of November, 1994, with the intent to promote or aid the commission of an offense, to-wit: Burglary First Degree, agreed with one or more persons, that at least one of them or another would engage in conduct constituting the offense of Burglary First Degree in violation of A.R.S. 13-1508, in violation of A.R.S. §§ 13-1003, 13-13-1508, 13-1506,

Appendix C

13-1501, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-801 and 13-812.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a gun, a deadly weapon or dangerous instrument, in violation of A.R.S. § 13-604(P).

COUNT 3:

TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or about the 28th day of November, 1994, in the course of taking property of another from John Magoch's person or immediate presence and against his will, used threats or force against John Magoch, with the intent to coerce surrender of the property or to prevent resistance to TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II'S taking or retaining the property while TIMOTHY STUART RING, JAMES HAROLD GREENHAM and/or WILLIAM ELWOOD FERGUSON II or an accomplice was armed with a deadly weapon or a simulated deadly weapon or used or threatened to use a deadly weapon or dangerous instrument or a simulated deadly weapon, to-wit: a gun, in violation of A.R.S. §§ 13-1904, 13-1901, 13-1902, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-801, and 13-812.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition

of a gun, a deadly weapon or dangerous instrument, in violation of A.R.S. § 13-604(P).

COUNT 4:

TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or about the 28th day of November, 1994, with the intent to commit a theft or a felony therein, entered or remained unlawfully in or on a non-residential structure of Wells Fargo Armored Carrier's van making a pickup or delivery at the Arrowhead Mall, Glendale, Maricopa County, Arizona, while he or his accomplice knowingly possessed an explosive, a deadly weapon, or a dangerous instrument, to-wit: a gun, in violation of A.R.S. §§ 13-1501, 13-1508, 13-1506, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-801, and 13-812.

The State of Arizona further alleges that the offense charged in this count is a dangerous felony because the offense involved the discharge, use, or threatening exhibition of a gun, a deadly weapon or dangerous instrument, in violation of A.R.S. § 13-604(P).

COUNT 5:

TIMOTHY STUART RING, JAMES HAROLD GREENHAM and WILLIAM ELWOOD FERGUSON II, on or about the 28th day of November, 1994, without lawful authority, knowingly, controlled Wells Fargo Armored Carrier's cash, of a value of $100,000 or more, with the intent to deprive Wells Fargo Armored Carrier of such property, in violation of A.R.S. §§ 13-1801, 13-1802, 13-301, 13-302, 13-303, 13-304, 13-701, 13-702, 13-801 and 13-812.

A True Bill
("A True Bill")

Date: February 24, 1995

s/ Janet Lee Kistler
JANET LEE KISTLER
FOREMAN OF THE GRAND JURY

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

s/ Alfred M. Fenzel
ALFRED M. FENZEL
DEPUTY COUNTY ATTORNEY

APPENDIX D — NOTICE OF SUPERVENING INDICTMENT DATED FEBRUARY 28, 1995

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NO. CR95-01754

177 GJ 304

THE STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY STUART RING (A),

Defendant.

NOTICE OF SUPERVENING INDICTMENT

NO BOND/NI

An indictment having been filed this 24th day of February, 1995, in the Superior Court of Maricopa County, Arizona, charging you, TIMOTHY STUART RING, with the crimes of:

COUNT 1: MURDER FIRST DEGREE, A CLASS 1 DANGEROUS FELONY and **COUNT 3:** ARMED ROBBERY, A CLASS 2 DANGEROUS FELONY, and having been denied admission to bail on these charges in Direct Complaint No. CR95-01507 in the Superior Court, Maricopa County, Arizona,

Appendix D

COUNT 2: CONSPIRACY TO COMMIT MURDER FIRST DEGREE, A CLASS 1 DANGEROUS FELONY **OR IN THE ALTERNATIVE** CONSPIRACY TO COMMIT ARMED ROBBERY, A CLASS 2 DANGEROUS FELONY **OR IN THE ALTERNATIVE** CONSPIRACY TO COMMIT BURGLARY FIRST DEGREE, A CLASS 3 DANGEROUS FELONY; **COUNT 4:** BURGLARY FIRST DEGREE, A CLASS 3 DANGEROUS FELONY and **COUNT 5:** THEFT, A CLASS 3 FELONY, and not having been initialed and no Complaint having been filed in the Glendale Justice Court Precinct, Maricopa County, Arizona, you are

HEREBY NOTIFIED to appear before this court to answer the Indictment in Room 501, Central Courts Building, 201 West Jefferson, Superior Court, at Phoenix, Arizona, on Monday, March 6, 1995, at the hour of 8:30 a.m.

FAILURE TO APPEAR WITHOUT GOOD CAUSE WILL PLACE YOU IN CONTEMPT OF COURT, AND A WARRANT WILL BE ISSUED FOR YOUR ARREST.

GIVEN UNDER MY HAND AND SEAL of the said Court this 24th day of February, 1995, by order of the Court.

CLERK OF THE SUPERIOR COURT

By s/ Brenda S. Burton
Deputy Clerk

Appendix D

Copy of the foregoing
mailed this __ day
of February, 1995, to:

__ TIMOTHY STUART RING, Defendant
(In Custody - Booking #694573)
✓ Greg Clark, Defendant's Attorney
45 West Jefferson, 11th Floor
Phoenix, AZ 85003-2307
__ Court Administrator
__ Jail

By _____
Deputy Clerk

APPENDIX E — JURY INSTRUCTIONS

CR95-01754

THE STATE OF ARIZONA,

v.

TIMOTHY STUART RING

I am now going to tell you the rules you should follow to decide this case. It is your duty to follow these instructions.

It is also your duty to determine the facts. "Facts" means what actually happened. You determine the facts only from the evidence produced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel I have about the facts. You are the sole judges of what happened.

You must consider all of these instructions. Do not pick out one instruction or part of one and disregard the others. However, after you have determined the facts, you may find that some instructions no longer apply.

You must then consider the instructions that do apply, together with the facts as you have determined them. Decide this case by applying these instructions to the facts which you find.

* * *

In their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence.

* * *

Appendix E

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree those facts do exist and are not disputed.

* * *

You must find the facts from the evidence in court. The evidence which you are to consider consists of exhibits and testimony of witnesses.

If an objection to a lawyer's question was sustained, you should disregard that question and any answer given.

Any testimony stricken from the court record must not be considered by you.

* * *

You must decide the believability of witnesses. In doing so, take into account such things as their ability and opportunity to observe, their memory and manner while testifying, any motive or prejudice they might have, and any inconsistent statements. Consider each witness' testimony in light of all of the other evidence in the case.

* * *

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. However, a witness may testify as to an opinion on a subject upon which the witness has become an expert because of education, study, or experience. You should consider the opinion of an expert and should weigh the reasons, if any, given for it. However, you

Appendix E

are not bound by any expert opinion. Give the expert opinion the weight that you believe it deserves.

* * *

The State has charged the defendant with certain crimes in this case. These charges are not evidence against the defendant. You must not think the defendant is guilty just because of these charges. The defendant has pled "not guilty." This plea of "not guilty" means that the State must prove every part of each charge beyond a reasonable doubt.

* * *

Evidence can be divided into direct and circumstantial evidence. Direct evidence is the testimony of a witness that saw, heard, or otherwise observed an event. Circumstantial evidence is the proof of a fact or facts from which you may find another fact. The law makes no distinction between direct and circumstantial evidence. You must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.

* * *

The State has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not true, or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few

things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find the defendant guilty. If, on the other hand, you think there is a real possibility that the defendant is not guilty, you must give him the benefit of the doubt and find the defendant not guilty.

You must decide whether or not the State has proven the defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent and you must start with the presumption that the defendant is innocent. The State must then prove the defendant guilty beyond a reasonable doubt. This means that the State must prove each element of the charge beyond a reasonable doubt. It is the law that no verdict of guilty can stand on mere suspicion, probability, or supposition for these alone do not warrant a conviction. If you conclude that the State has not met its burden of proof beyond a reasonable doubt, then you must find the defendant not guilty of that charge.

* * *

The crime of first degree murder with premeditation requires proof of the following three things:

1. The defendant caused the death of another person; *and*

2. The defendant intended or knew that he would cause the death of another person; *and*

3. The defendant acted with premeditation.

"Premeditation" means that the defendant's intention or knowledge existed before the killing long enough to permit reflection. However, the reflection differs from the intent or knowledge that conduct will cause death. It may be as instantaneous as successive thoughts in the mind, and it may be proven by circumstantial evidence.

* * *

The crime of first degree felony murder requires proof of the following two things:

1. The defendant and another person or persons committed or attempted to commit armed robbery; *and*

2. In the course of and in furtherance of this crime or immediate flight from this crime, the defendant or another person caused the death of any person.

* * *

The crime of conspiracy to commit armed robbery requires proof of the following things:

1. That the defendant agreed with one or more persons that one of them or another person would engage in certain conduct; *and*

2. That the defendant intended to promote or assist the commission of such conduct; *and*

3. That the intended conduct would constitute the crime of armed robbery.

* * *

Appendix E

To prove the existence of a conspiracy, the State need not show the making of an express or formal agreement. Nor need the State prove that all the means set forth in the indictment were agreed upon, nor that all the means agreed upon were actually used, nor that each and every person charged as a member of a multi-party conspiracy was such. The State must only prove the elements of conspiracy as defined in the previous instruction.

* * *

The fact that persons conduct themselves in a similar manner or associate with each other or assemble together or discuss common aims does not alone prove a conspiracy.

* * *

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers some object of the conspiracy does not thereby become a conspirator.

Before you find that a defendant or any other person was a member of a conspiracy, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant or other person claimed to have been a member knowingly participated in the unlawful plan with the intent to promote or assist the carrying out of the conspiracy.

A person understanding the unlawful character of a plan who knowingly encourages, advises, or assists the undertaking thereby also becomes a conspirator.

Appendix E

One who knowingly joins an existing conspiracy is charged with the same responsibility as an originator or instigator of the conspiracy.

In determining whether a conspiracy exists, you should consider the actions and statements of all of the alleged participants. However, in determining whether a particular defendant was a member of the conspiracy, you should consider only that person's acts and statements. A person cannot be bound by the acts or statements of other participants until it is established that a conspiracy existed and that that person was one of its members.

* * *

In your consideration of the evidence regarding the offense of conspiracy, you should first determine whether or not the conspiracy existed, as alleged in the indictment. If you conclude that the conspiracy did exist, you should next determine whether or not the accused knowingly became a member of the conspiracy.

There may be liability even though the conspirators do not succeed in accomplishing their common object. In order for a conspiracy to be proven, it is not necessary that the prosecution show that the conspirators succeeded.

* * *

The indictment charges the defendant with the crimes of conspiracy to commit armed robbery and armed robbery. These charges are independent, and the evidence should be considered separately for each charge.

* * *

Appendix E

The crime of armed robbery requires proof of the following two things:

1. The defendant committed a robbery; *and*

2. The defendant or an accomplice was armed with a gun.

* * *

The crime of robbery requires proof of the following four things:

1. The defendant took another person's property; *and*

2. The taking was from the other person's person or immediate presence; *and*

3. The taking was against the other person's will; *and*

4. The defendant threatened or used force against any person with the intent to coerce surrender of the property or to prevent resistance to taking or keeping the property.

* * *

The crime of burglary in the first degree requires proof of two things:

1. The defendant committed a burglary; *and*

Appendix E

2. At some time between the moment of entry through flight from the scene the defendant or an accomplice was armed with a gun.

* * *

The crime of burglary requires proof of the following two things:

1. The defendant entered or remained unlawfully in or on a nonresidential structure; *and*

2. The defendant did so with the intent to commit any theft or armed robbery therein.

* * *

* * *

"Enter or remain unlawfully" means an act of a person who enters or remains on premises when such person's intent for so entering or remaining is not licensed, authorized or otherwise privileged.

* * *

"Non-residential structure" means any structure other than residential structure and includes a motor vehicle.

* * *

"Entry" means the intrusion of any part of any instrument or any part of a person's body inside the external boundaries of a structure which would include any vehicle used for business, transportation, or storage.

* * *

Appendix E

The crime of theft requires proof of the following two things:

1. The defendant knowingly controlled another person's property; *and*

2. The defendant intended to deprive the other person of the property.

* * *

"Control" or "exercise control" means to act so as to exclude others from using their property except on the defendant's own terms.

* * *

"Deprive" means to withhold the property interest of another either permanently or for so long a time period that a substantial portion of its economic value or usefulness or enjoyment is lost or to transfer or dispose of it so that it is unlikely to be recovered.

* * *

"Property of another" means property in which any person other than the defendant has an interest which the defendant is not privileged to infringe.

* * *

Appendix E

A person may be guilty of an offense committed by such person's own conduct or by the conduct of another for which such person is criminally accountable, or both.

* * *

A person is criminally accountable for the conduct of another if the person is an accomplice of such other person in the commission of an offense.

If causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense if the person solicits or commands another person to engage in the conduct causing such result, or the person aids, counsels, agrees to aid or attempts to aid another person in planning or engaging in the conduct causing such result.

* * *

"Accomplice" means a person, who, with the intent to promote or facilitate the commission of an offense

1. Solicits or commands another person to commit the offense; *or*

2. Aids, counsels, agrees to aid, or attempts to aid another person in planning or committing the offense; *or*

3. Provides means or opportunity to another person to commit the offense.

Appendix E'

An absent defendant is criminally accountable for the conduct of another if the absent defendant caused, solicited, aided, commanded, etc. the other person to commit an offense and the absent defendant had the culpable mental state required for the commission of that offense.

* * *

"Intentionally" or "with intent to" as used in these instructions means that a defendant's objective is to cause that result or to engage in that conduct.

* * *

The State must prove that the defendant did a voluntary act forbidden by law. You may determine that the defendant intended to do the act if the act was done voluntarily.

* * *

Intent may be inferred from all the facts and circumstances disclosed by the evidence. It need not be established exclusively by direct sensory proof. The existence of intent is one of the questions of fact for your determination.

* * *

"Knowingly" means that a defendant acted with awareness of or belief in the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law.

* * *

Appendix E

If the State is required to prove that the defendant acted "knowingly," that requirement is satisfied if the State proves that the defendant acted "intentionally."

* * *

If you find the defendant guilty of the crime of conspiracy to commit armed robbery, armed robbery, or burglary first degree, you must then determine whether or not the offense was a dangerous offense. An offense is a dangerous offense if it involved the discharge, use, or threatening exhibition of a gun.

* * *

It is no defense to the crime charged against the defendant that another person or persons not now on trial might have participated or cooperated in the crime. You should not guess the reason for the absence from the courtroom of such other person or persons. The only matter before you for your decision is the guilt or innocence of Timothy Stuart Ring.

* * *

Evidence of other bad acts of the defendant has been admitted into evidence in this case. Such evidence is not to be considered by you to prove the character of the defendant or to show that he committed any offense charged. It may, however, be considered by you regarding the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

* * *

Appendix E

All twelve of you must agree on a verdict. All twelve of you must agree whether the verdict is guilty or not guilty. When you go to the jury room you are to choose a foreperson who will be in charge during your deliberations and who will sign any verdict.

You will be given ten forms of verdict upon which to indicate your decision. They read as follows.

* * *

In deciding whether the defendant is guilty or not guilty, do not consider the possible punishment. Punishment is decided by the judge, not by the jury.

APPENDIX F — NOTICE OF AGGRAVATING FACTORS AND WITNESSES DATED DECEMBER 10, 1996

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

NO. CR 95-01754

STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY RING,

Defendant.

STATE'S RULE 15.1(g) NOTICE OF AGGRAVATING FACTORS AND WITNESSES

(Assigned to the Honorable Gregory Martin)

The State of Arizona, by and through undersigned counsel, pursuant to 17 A.R.S. Rules of Criminal Procedure Rule 15.1(g) hereby discloses and lists the aggravating factors and the evidence the State will present at the Death Penalty Hearing.

On December 6, 1996 the defendant was convicted of First Degree Murder, Conspiracy to Commit Armed Robbery, Armed Robbery, Burglary and Theft. The Armed Robbery, Burglary and Theft convictions were found by the Jury to be dangerous offenses.

Appendix F

The aggravating factors which the State intends to prove are:

1) A.R.S. § 13-703(F)(2) — The defendant has been convicted of a serious offense, to-wit: Armed Robbery, whether preparatory or completed.

2) A.R.S. § 13-703 (F)(5) — The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

3) A.R.S. § 13-703 (F)(6) — The defendant committed the offense in an especially heinous, cruel or depraved manner.

EVIDENCE TO PROVE THE AGGRAVATING FACTORS;

The State requests this Court to take Judicial Notice of all the evidence and testimony presented at trial which was proven beyond a reasonable doubt as proof of the aggravating factors pursuant to A.R.S. § 13-703(c).

In addition the State may call the following witnesses:

Detective Thomas Clayton

William Morris

Dr. Philip Keen

The State reserves the right to supplement this list if needed to prove the allegations.

Appendix F

In addition to the Exhibits admitted during trial, the State may introduce additional photographs or medical records of the victim's injuries.

Submitted December 10th, 1996.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

BY s/ Alfred M. Fenzel
Alfred M. Fenzel
Deputy County Attorney

Copy of the foregoing
mailed\delivered this
10th day of December, 1996,
to:

The Honorable Gregory Martin
Judge of the Superior Court

Mr. Gregory Clark
Attorney at Law
45 W Jefferson St Fl 12
Phoenix, AZ 85003-2330

BY s/ Alfred M. Fenzel
Alfred M. Fenzel
Deputy County Attorney

APPENDIX G — EXCERPTS OF PRESENTENCE HEARING IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA DATED OCTOBER 9, 1997

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CR-95-01754

STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY RING,

Defendant.

Phoenix, Arizona
October 9, 1997

BEFORE: THE HONORABLE GREGORY H. MARTIN

Reporter's Transcript of Proceedings

Presentence Hearing

Janet Freeby
Court Reporter

APPEARANCES

For The State: Alfred M. Fenzel
Deputy County Attorney

For The Defendant: Greg Clark
Treasure L. VanDreumel
Attorneys at Law

Appendix G

INDEX

WITNESSES:	EXAMINATION BY:	ON PAGE:
Greenham, James	Mr. Fenzel	35
	Mr. Clark	65
	Mr. Fenzel	100
Keen, Dr. Philip	Mr. Fenzel	106
	Mr. Clark	110
	Mr. Fenzel	124
	Mr. Clark	127
Morris, William	Mr. Fenzel	128
	Mr. Clark	135

[35] Okay. Mr. Fenzel.

MR. FENZEL: Thank you. We call James Greenham.

THE COURT: Come on up, Mr. Greenham.

THE COURT: Mr. Greenham, are you able to bring that mike to you?

THE WITNESS: Yes.

THE COURT: Bring it right to your mouth, if you can. Can you help, Mr. Fenzel?

THE WITNESS: That it?

Appendix G

THE COURT: Yes. Keep your voice up so we can all hear you, please.

The record should show that Mr. McVay is here, counsel for Mr. Greenham.

JAMES GREENHAM,

a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FENZEL:

Q. Would you please state your name for the record?

A. James Harold Greenham.

Q. Mr. Greenham, how old are you?

A. Thirty-one.

[36] Q. You're currently in custody; is that correct?

A. Yes, sir.

Q. Are you in custody in relation to an incident that happened on November twenty-eight, nineteen ninety-four?

A. Yes, sir, I am.

Appendix G

Q. Is that incident an armored car robbery at the Arrowhead mall on that Monday following Thanksgiving back in nineteen ninety-four?

A. Yes, sir, it is.

Q. Have you entered a plea of guilty in connection with that case?

A. Yes, sir, I have.

Q. What have you pled guilty to?

A. Second degree murder.

Q. What else have you pled guilty to, if anything?

A. Two counts of armed robbery.

Q. What are the two counts of armed robbery related to?

A. One count's related to an armored car incident. The second count, I believe, is related to the PACE incident on December twenty-third.

Q. Do you have an understanding of what your [37] sentence will be? You haven't been sentenced; have you?

A. No, I have not.

Appendix G

Q. Do you understand what your sentence will be in connection with these pleas?

A. Yes, I do.

Q. Can you please tell us what you expect your sentence to be?

A. Twenty-seven point five years.

Q. With respect to that plea agreement, do you have any obligations?

A. Yes, sir, I do.

Q. And what are your obligations?

A. To cooperate fully with the State of Arizona.

Q. As part of your obligation to tell the truth?

A. Yes, sir.

Q. Has anybody threatened you or forced you to become a witness in this case?

A. No, sir, they have not.

Q. With respect to November twenty-eighth, nineteen ninety-four, were you present during the armored car robbery at the Arrowhead mall?

A. Yes, sir, I was.

Appendix G

Q. Would you please tell the Court how you [38] came to be present at the Arrowhead mall?

A. Myself, Mr. Ferguson and Timothy Ring had planned on robbing an armored car that was parked at the mall.

Q. When did you plan on robbing the armored car?

A. There was two plans. Early in November. A final stage plan was set at Mr. Ring's house that afternoon.

Q. The robbery happened about twelve thirty, one thirty in the afternoon; is that right?

A. Yes, sir.

Q. Did you meet at Mr. Ring's house before that?

A. Yes, sir, we did.

Q. Who met in Mr. Ring's house before the armored car robbery at the Arrowhead mall?

A. Myself and Mr. Ferguson.

Q. Was anybody else with you?

A. No, sir.

Q. What, if anything, was discussed when you were at Mr. Ring's house that morning?

A. We were — we discussed how we were going to take down the van, what we were going to do in respect to tactical decisions.

[39] Q. Who was involved in those discussions?

A. Myself, Mr. Ferguson and Mr. Ring.

Q. What, if anything, did Mr. Ring, or what role did Mr. Ring play in those discussions? What did he say?

A. Basically, Mr. Ring had I guess taken the role as leader because he laid out all the tactics.

Q. What were the tactics that Mr. Ring laid out?

A. Who was going to take part in what. Who was going to do what in the role of the armored car robbery.

Q. Did there come a time when you left Mr. Ring's house and went to the mall where the robbery took place?

A. Yes, there was.

Q. How did you get there?

A. Vehicles.

Q. What kind of cars?

A. Two trucks. My Chevy pickup truck, Mr. Ring's four-wheel drive Toyota.

Q. What kind of truck were you driving?

A. Brown Chevy four-wheel drive.

Q. What kind of truck was Mr. Ring driving?

A. A newer Toyota pickup truck.

[40] Q. What color was it?

A. Red.

Q. What vehicle were you in?

A. The Chevy pickup truck.

Q. What truck was Mr. Ring in?

A. Toyota four-wheel drive.

Q. Where was Mr. Ferguson?

A. He was with me in my pickup truck.

Q. What happened when the armored car pulled up?

A. The armored car pulled up. We had watched it for a couple of minutes. The driver then turned, opened his door and started smoking a cigarette. I got out of my pickup truck, stood by the bumper. Mr. Ring shot Mr. Magoch. Then I walked towards the armored car, I pushed Mr. Magoch over, I got in the armored car and I drove away.

Appendix G

Q. With respect to the way it was done physically, where did the armored car pull up in relation to the Dillard's entrance?

A. Right in front of Dillard's. Probably right next, right near the entrance of the Dillard's.

Q. In relation to that entrance, where was your brown pickup truck parked?

A. Thirty to forty yards facing the driver's [41] door of the armored car vehicle.

Q. What direction was your car or your truck?

A. I believe my truck was facing westbound. Kind of southwest bound.

Q. And what is — and was your truck at any particular angle with respect to the armored van?

A. Yes, it was.

Q. How was it parked?

A. It was parked basically at an angle to where I could see right into the driver's compartment.

Q. What kind of angle?

A. Probably forty-five degree angle, I would say, something like that.

Appendix G

Q. Were you able to see in the driver's compartment?

A. Yes, sir, I was.

Q. How long had you been in that parking lot prior to the armored car arrival?

A. Maybe a half hour or so.

Q. Was Mr. Ring also in that parking lot?

A. Yes, sir, he was.

Q. Do you know where in that parking lot he was?

A. No, sir, I do not.

Q. Why is it that you do not know?

[42] A. Because I could not see Mr. Ring's pickup truck.

Q. Why was that?

A. I had the window covering on my windshield, my front windshield.

Q. What kind of window covering?

A. It was like window shades.

Q. One of those sun visor things?

A. Yes, sir.

Q. Did you have an idea where Mr. Ring was?

A. Yes, I had a general idea.

Q. And is there a reason why you had a general idea where he was?

A. Pre planning.

Q. Could you please tell the Court about that pre planning?

A. On one occasion, we had set up.

Q. You're saying we, who's we?

A. Myself and Mr. Ring. Myself and Mr. Ring had set up on the armored car to watch the armored car.

Q. Where did you set up on the armored car?

A. In relation to where Mr. Ring said he was going to park to do the shot.

Q. And where did Mr. Ring tell you he was going to park to do the shot?

[43] A. It was probably thirty, forty yards west of the armored car itself.

Q. Were you armed?

A. Yes, sir, I was.

Q. Was Mr. Ferguson armed?

A. Yes, sir, he was.

Q. Was Mr. Ring armed?

A. Yes, sir, he was.

Q. Were you, prior to the armored car arriving at the mall, in any communication with Mr. Ring?

A. Yes, sir.

Q. What kind of — how was it that you were able to maintain communication with him?

A. Two-way radios.

Q. Who had radios?

A. Myself, Mr. Ring both had two-way radios.

Q. Did Mr. Ferguson have anything?

A. Mr. Ferguson had a CB type of scanner radio.

Q. Talking about Mr. Ferguson. Do you know his full name?

A. William Ferguson.

Q. Do you know anything about him?

A. Other than he was a police officer twenty years, that's all I know about him.

[44] Q. Where was he a police officer?

A. Phoenix.

Q. What kind of weapon did you have?

A. A forty-five semi-automatic.

Q. What kind of weapon did Mr. Ferguson have?

A. I believe it was a semi-automatic, I don't know what make it was or caliber.

Q. What kind of weapon did Mr. Ring have?

A. Mr. Ring had a twenty-two rifle, plus a handgun in his fanny pack.

Q. What kind of twenty-two rifle?

A. I believe it was a Ruger, I'm not sure.

Q. Was it in any way modified, have any special equipment with it?

A. Yes, sir, it did.

Q. What was it?

A. It had a scope and a homemade silencer.

Q. Had you seen that rifle before?

A. Yes, sir, I had.

Q. When had you seen it before?

A. On other occasions when he had taken it out to try it out. On one prior occasion when myself, Mr. Ring, Mr. Sanders, Mr. Robbins set up to kill James Gonzales.

[45] MR. CLARK: Objection. Relevance, Judge.

THE COURT: I'll strike that last part of the answer. Sustained.

BY MR. FENZEL:

Q. With respect to the incident, you're all set up, armored car pulls up. What happens?

A. The armored car pulls up. We watched him. He had turned sideways, he opened his door about six to eight inches. He started smoking a cigarette.

Q. When you say he, talking about the driver of the van?

A. Yes, sir. I got out of my pickup truck, I stood by the bumper of my vehicle. I heard the shot break. I heard the shot go off, basically.

Q. What did it sound like?

A. It sounded like a pellet gun.

Q. I'm sorry, I can't hear you?

A. It sounded like a pellet gun.

Q. What happened then?

A. I then walked to the armored car. I opened the door all the way, I pushed Mr. Magoch over. I got in the armored vehicle, and I drove away.

Q. What were you wearing?

A. I was wearing Levi's, a large blue windbreaker. I had a baseball cap turned backwards. I [46] had a pair of sunglasses on.

Q. Did you have gloves on?

A. Yes, sir, I did.

Q. What happened after that?

A. We went to the church parking lot.

Q. How did you get to the church parking lot?

A. I drove the armored car there.

Q. Did you have some sort of prearranged plan to arrive in that church parking lot?

A. No, I did not.

Q. And how was it that you got from the mall to that church parking lot?

A. Mr. Ring told me by two-way radio where to go, which direction to turn.

Q. How was he able to do that?

A. By two-way radio.

Q. Was that as you're driving from the mall in that direction?

A. Yes, sir.

Q. Where was Mr. Ferguson when all of this was going on?

A. He was sitting in my brown four-wheel drive.

Q. Did Mr. Ferguson also follow you?

A. At one point in time, he followed Mr. Ring.

[47] Q. How was it that Mr. Ferguson was able to follow you and Mr. Ring?

A. He had heard which directions I was turning over the radio by his scanner.

Q. Did there come a time when you actually got to the church parking lot?

A. Yes, there was.

Q. What happened when you got to the church parking lot?

A. I checked on Mr. Magoch again to make sure he was alive, which he was alive. I got in the back of the van.

THE COURT: You say he was alive?

THE WITNESS: Yes, sir, I did.

THE COURT: He was?

THE WITNESS: Yes, sir, he was.

BY MR. FENZEL:

Q. He was still breathing?

A. He was still breathing.

Q. Was he conscious?

A. No, he was not.

Q. Do you know where he had been wounded?

A. No, I do not.

Q. What happened then?

[48] A. I got in the back of the armored van. I started gathering up all of the sacks of money. I started putting them

in the larger bags. When that was completed, I set them near the side exit door on the passenger side of the van itself. I then called Mr. Ring over the radio, asked him to come up so we could start offloading the van.

Q. Did that happen?

A. Yes, sir, it did.

Q. How was that accomplished?

A. Over two-way radio.

Q. Did Mr. Ring come up?

A. Yes, sir, he did.

Q. And did you offload the money?

A. Yes, sir, we did.

Q. How long did it take?

A. Maybe five minutes, if that. No more than ten.

Q. Where did the money go to?

A. In the back of Mr. Ring's king cab pickup truck.

Q. That's in the red truck?

A. Yes, sir.

Q. Where's Mr. Ferguson while all of this is going on?

[49] A. Mr. Ferguson had not yet arrived. Mr. Ferguson hadn't arrived until after we had completed offloading the vehicle.

Q. Did he in fact pull into the church parking lot while you were still there?

A. Yes, he did.

Q. What happened after that?

A. We had completed offloading the van, I got back in my pickup truck, and then we drove off from the church.

Q. Where did you go?

A. We headed up Grand Avenue, I believe. We stopped in a vacant field somewhere along the way.

Q. Why did you stop in a vacant field?

A. So Mr. Ring could take off his fictitious plate that he had on the back of his truck.

Q. What happened then?

A. We then left from the field. We started driving towards Yarnell.

Q. Did you stop on the way to Yarnell, other than in the field?

A. Yes, sir, we did.

Q. Where did you stop?

A. We stopped somewhere in the desert.

Q. Approximately where, do you know?

[50] A. Somewhere before Yarnell. I can't be more specific, I'm not sure.

Q. Did you ever go back there with the police?

A. Yes, sir, I did.

Q. And showed the police where that was?

A. Yes, sir, I did.

Q. What did you do when you were in that particular location?

A. During the robbery?

Q. Just after the robbery. The same day of the robbery, you're at this place, what did you do, if anything?

A. We separated all the money from the checks, we separated all the spindle cash from all the stuff that couldn't be used.

Q. When you say we, who's we?

A. Myself, Mr. Ring, Mr. Ferguson.

Q. Anybody else?

A. No, sir.

Q. Was anybody else involved in the actual robbery of the armored car on that date besides you, Ring and Ferguson?

A. And the actual assault of the vehicle?

Q. Yes.

A. No, sir.

[51] Q. Nobody else there?

A. Not that I'm aware of, no.

Q. After you split the money from the checks, the cash from the checks, what did you do?

A. After we did that, we went to another location, and we started burning all the checks and the receipts.

Q. You say you went to another location. How far away were these two locations?

A. Maybe twenty, thirty yards apart.

Q. Was yours in this field that he went from one place in the field to another, and you burned the checks?

A. Yes, sir.

Q. Where were you when all of this was going on?

A. During the burning?

Q. Burning of the checks.

A. I was on top of the hill being a lookout looking for oncoming traffic.

Q. What happened after you finished doing all of that?

A. We loaded back up. Mr. Ring and Mr. Ferguson got in Mr. Ring's vehicle. All the cash was placed in my pickup truck, we then left from the [52] burn site.

Q. When Mr. Magoch was in the van, was he armed?

A. Yes, he was.

Q. Do you know what, if anything, happened to his gun?

A. I had taken the one I had gotten in the vehicle.

Q. When you left the church parking lot, what happened to Mr. Magoch's gun?

A. We took it with us.

Q. You say we took it with us, who's we?

A. Myself, Mr. Ring.

Q. What did you do with the gun, if anything, when he came out of the van with it?

A. I believe I gave it to Mr. Ring, if I recall correctly.

Q. Can you tell us what ultimately happened to that weapon?

A. Mr. Ring had taken it and thrown it in a man-made pond of some sort. I don't recall where that location is at.

Q. Did you take police to where that location was?

A. Yes, sir.

[53] Q. Did you show them where the gun, or the lake was that the gun was thrown into?

A. Yes, I did.

Q. When was that gun thrown into the lake?

A. I believe it was the night of the robbery.

Q. Who threw the gun into the lake?

A. Mr. Ring.

Q. We're talking about Mr. Ring? How long have you known Timothy Ring?

A. On and off from the spring of nineteen ninety-two, I believe.

Q. Is the person known to you as Timothy Ring present in the courtroom?

A. Yes, sir, he is.

Q. And could you please tell us where he is and what's he wearing?

A. He's sitting next to Mr. Clark. He's wearing a black and white jail uniform, the same thing I have on.

MR. FENZEL: Your Honor, may the record reflect the witness has identified the defendant?

THE COURT: It may.

BY MR. FENZEL:

Q. After you're in the field, you drive north [54] into Yarnell; is that right?

A. Yes, we do.

Q. After you get up to Yarnell, what happens?

A. We just drove through Yarnell, I believe we drove through Prescott. I know there's one point in time we had stopped at a Burger King to get something to eat, and then we came back down I-17 southbound to the Valley.

Q. When you say we, who's we?

A. Myself, Mr. Ring and Mr. Ferguson.

Q. What car, or what vehicle were you in?

A. I was in my brown Chevy four-wheel drive.

Q. Was anybody in that vehicle with you?

A. No, sir.

Q. Where was Mr. Ferguson?

A. Mr. Ferguson was riding with Mr. Ring.

Q. When he got back into the Phoenix area, where did you go?

A. Before we came back to Happy Valley Road, Mr. Ring came over the radio, told me to go to the Albertson's parking lot off of I-17 and Bell Road and wait for him there. Mr. Ring was going to take Mr. Ferguson back to Mr. Ring's house to drop Mr. Ferguson off to pick up his vehicle. Mr. Ring was going to come back and meet me at the Albertson's.

[55] Q. Did that happen?

A. Yes, sir, it did.

Q. After Mr. Ring met you at this Albertson's, what did you do then?

A. We had parked my vehicle, my brown Chevy four-wheel drive across the street at the Smitty's. I believe after that we had driven to the pond to dispose of

Mr. Magoch's weapon. Mr. Ring had dismantled his twenty-two rifle that he had with him that he shot Mr. Magoch with, and we drove to a motel.

Q. What kind of shot is Mr. Ring?

A. He's a very excellent shooter.

Q. You went to a motel. What happened at the motel?

A. I stayed in the motel with all the money. Mr. Ring went home.

Q. Did there come a time where you saw Mr. Ring again?

A. Yes, sir, there was.

Q. When was that?

A. The day after.

Q. Would you please tell the Court the circumstances that you saw Mr. Ring the day after?

A. Mr. Ring had came back to the motel to pick me up, basically.

[56] Q. Where did you go?

A. Drove around the Valley for a little bit. At one point in time, we went to the mall. Mr. Ring went to the mall. Mr. Ring wanted to go and talk to Mr. Ferguson.

Q. You said the mall. Is that the same mall where the robbery took place?

A. No, sir, there was a mall which Mr. Ferguson was working at the time.

Q. Where was Mr. Ferguson working at the time?

A. It was for a camera shop. I don't recall which mall right now. It was for a camera shop.

Q. Do you know whether or not it was the Paradise Valley mall?

A. It's a possibility.

Q. You went to the mall. What happened when you went to the mall?

A. Mr. Ring had gone in to the mall to talk to Mr. Ferguson. I had stayed in the vehicle to basically sit on the cash.

Q. Did there come a time when you left that area?

A. Yes. Yes, there was.

Q. Where did you go?

A. I believe we made one stop at Shooters [57] World. We made a second stop at another motel.

Q. Did there come a time that you went to Sun City?

A. Yes, there was.

Q. When did that occur?

A. That was the evening after the robbery.

Q. It was the same day that you had gone to the mall later on that night, is that what you're talking about?

A. Yes, sir, it was.

Q. Where in Sun City did you go?

A. We went to Mr. Ferguson's mother's house.

Q. Is it a house or is it an apartment?

A. It's an apartment.

Q. What did you do when you were there?

A. We started breaking down the money. We started breaking down the denominations of the cash.

Q. How long did that take?

A. In actual time, I'm not sure. I know it took a couple of hours.

Q. What happened to the money after you broke it all down?

A. It was split up.

Q. When you said it was split up, how was it split up?

[58] A. It was first split up in three divided ways. Mr. Ferguson received his share from Mr. Ring. Both mine and Mr. Ring's had gone in the same duffel bag.

Q. Did Mr. Ring in fact keep your share?

A. Yes, sir, he did.

THE COURT: Mr. Fenzel, how much more direct do you have? Probably should take a break.

MR. FENZEL: Okay.

THE COURT: Let's break for just ten minutes.

MR. FENZEL: Okay.

(Recess taken.)

THE COURT: Go ahead, Mr. Fenzel.

BY MR. FENZEL:

Q. Mr. Greenham, you said that it took several hours to count the money while you were over at Mr. Ferguson's parents' apartment; is that right?

A. Yes, sir.

Q. Can you please describe the mood — first of all, who was there during the counting of the money?

A. Myself, Mr. Ring and Mr. Ferguson.

Q. Was there anybody else involved in the counting of the money?

A. No, sir, no one else was present.

[59] Q. No one else was involved in the robbery?

A. No, sir. Not the physical assault and stuff.

Q. Can you please describe the mood of the three of you while you're counting the money?

A. It was a pretty happy mood.

Q. And why do you say it was a pretty happy mood?

A. Because we had all the money.

Q. Was that expressed at all by anybody? And if so, how?

A. I don't understand your question.

Q. Well, you said you were happy. You were happy, right?

A. Not by the fact of having the money, no. I was distraught because Mr. Magoch was dead. The fact that we had the money was a secondary issue.

Q. With respect to the death of Mr. Magoch, was that at all discussed?

A. Yes, sir, it was.

Q. Can you please tell the Court how the fact, or the death of Mr. Magoch was discussed came about? I'm talking about at the time you counted the money, is that right?

A. Correct.

[60] Q. Okay. What was discussed?

A. Basically, actual shooting of Mr. Magoch.

Q. Who discussed it?

A. Mr. Ring.

Q. What, if anything, did Mr. Ring say about the actual shooting of Mr. Magoch?

A. Mr. Ring had asked just an offhand — he didn't ask myself and Mr. Ferguson in general, he just asked, you guys are forgetting something, meaning myself and Mr. Ferguson.

Q. Was there a response to that?

A. Mr. Ferguson said, what. And Mr. Ring had stated, you're forgetting to congratulate me on my shot.

Q. Mr. Ring said to both of you, you're forgetting something?

A. Correct.

Q. Mr. Ferguson responded, what, and Mr. Ring then said, forgetting to congratulate me on my shot?

A. That's correct.

Q. What happened then?

A. Mr. Ferguson stated, nice shot. It was left at that.

Q. Did there come a time where you finished counting money?

A. Yes, there was.

[61] Q. Did Mr. Ferguson then take his share of the money?

A. Yes, he did.

Q. You said that your share was put into a duffel bag?

A. I am — excuse me?

Q. Your share was put into a duffel bag with Mr. Ring's share?

A. Yes, sir, it was.

Q. What happened to your share?

A. It went to Mr. Ring's home.

Q. How did it get there?

A. By Mr. Ring's vehicle.

Q. Did there come times when you would spend money after that?

A. Yes, sir.

Q. How did it come about that you were able to spend money after that?

A. Mr. Ring would give me money.

Q. Would you have to ask for it?

A. Yes, sir.

Q. And how would you go about asking for it?

A. I would just tell him I need money, and he would give me spending money.

Q. Mr. Greenham, Mr. Magoch, was he at all [62] involved with the planning of this robbery?

A. No to my knowledge, no.

Q. You made some statements along the way that are different from the statements you're making now; is that right? You told people at one point Mr. Magoch may have been involved; is that right?

MR. CLARK: Judge, I would object, it's leading. I would like some foundation.

THE COURT: Sustained.

BY MR. FENZEL:

Q. Did you ever make statements different from what you're telling us today to anybody?

A. Yes, I did.

Q. And was there a reason why you would have made those statements?

A. Yes, sir, there was.

MR. CLARK: Judge, once again, I'm going to object for lack of foundation. What statements, when.

THE COURT: Yes. Sustained.

BY MR. FENZEL:

Q. Did you ever speak to Mr. Clark or Mr. Foreman or anybody else and tell them something differently than what you said today?

[63] A. Yes, sir.

MR. CLARK: Okay, Judge, it's compound.

THE COURT: That's compound. It calls for yes or no. Let's lay the foundation for the statements, and then . . .

BY MR. FENZEL:

Q. After you were represented by Mr. Blischak, did there come a time that you were not represented by Mr. Blischak?

A. Yes, sir, there was.

Q. You were representing yourself?

A. Yes, sir, I was.

Q. You were in the jail?

A. Yes, sir.

Q. During that time frame, did you later on get Mr. Blischak back on the case and Mr. McVay back on the case representing you? Is that correct?

A. Mr. McVay didn't come on until later.

Q. So my question is going to be addressed to the time when you were representing yourself.

A. Correct, I understand.

Q. Did you speak to Mr. Clark?

A. Yes, sir, I did.

Q. Did you speak to Mr. Foreman?

[64] A. Yes, sir, I did.

Q. You told them things different than what you said today?

MR. CLARK: Objection, leading, Judge.

THE WITNESS: Yes, sir.

BY MR. FENZEL:

Q. What did you tell them?

A. I made false statements to them in the respect that Mr. Ring, Mr. Ferguson did not do this crime.

Q. Why did you make those statements to Mr. Clark and/or Mr. Foreman?

A. Death threats. Or threats from Mr. Ring.

Q. Would you please tell the Court about that?

A. I had received death threats from Mr. Ring on two separate occasions.

Q. In what form were the death threats you received from Mr. Ring?

A. They were relayed to me by somebody else.

Q. How do you know they came from Mr. Ring?

A. I was told by jail personnel.

Q. With respect to what you testified to today, is that what happened with respect to the robbery?

[65] A. Yes, sir, it is.

MR. FENZEL: No further questions.

THE COURT: Mr. Clark.

MR. CLARK: Thank you, Judge.

CROSS-EXAMINATION

BY MR. CLARK:

Q. Mr. Greenham, you certainly know who I am, don't you?

A. Yes, sir, I do.

Q. This is not the first time we've had the opportunity to speak about the events that have led us to this point in time; correct?

A. No, sir, it's not.

Q. Okay. You and I have certainly had the opportunity when you were going pro per to speak about the facts of the case; correct?

A. Yes, sir, we have.

Q. And in connection with those conversations, you were provided either by myself or Mr. Ferguson's lawyers with DRs, pleadings, police reports, all related to the Wells Fargo homicide; correct?

A. Yes, sir, I was.

Q. Now, with respect to your arrest, that [66] occurred in February of nineteen ninety-five; correct?

A. Yes, sir.

Q. Okay. And during this time frame, you had a significant drug habit; correct?

A. Correct.

Q. Okay. Your drug of choice during this period of time is crystal meth; correct?

A. Correct.

Q. You had a drug habit of approximately two hundred fifty dollars a week; correct?

A. I wouldn't put a dollar figure on it, no. I'm not sure how much I spent a week.

Q. Do you recall having a conversation with me on April four, nineteen ninety-six, in Madison Street Jail?

A. I remember having a conversation with you, I don't recall the date.

Q. Okay. Let me digress for a moment here. Before we begin to talk about that conversation, it's true that on the date of your arrest, you are interviewed by Glendale Police Department; correct?

A. That's correct.

Q. Specifically, you're interviewed by Tom Clayton and Bruce Lowe; correct?

A. Correct.

[67] Q. Okay. With respect to that interview, it was certainly tape recorded; correct?

A. To my knowledge, yes.

Q. Okay. You've been provided transcripts of that statement; correct?

A. Yes, sir, I have.

Q. I believe I gave them to you, Mr. Blischak may have given them to you; correct?

A. Correct.

Q. Okay. And at the time of that statement, you were under the influence of crystal meth; correct?

A. That's correct.

Q. Okay. In fact, at that time, you had been on a binge for about three or four days; is that correct?

A. That's correct.

Q. Now, early on in this case, you enter into, subsequent to these statements and to your arrest, you enter into a deal with the State; correct?

A. That's correct.

Q. And that deal is not unlike the one that you presently have; correct?

A. That's correct.

A. That's correct.

Q. It does differ in some respects though; correct?

[68] A. That's correct.

Q. And in connection with that deal, you were set to testify against Mr. Ferguson and Mr. Ring; correct?

A. Yes, sir.

Q. You were later allowed by Judge Ryan to back out of that deal though; correct?

A. Yes, sir.

Q. And at that point in time, you were allowed to also go pro per; correct?

A. Yes, sir.

Q. And you in effect were acting as your own counsel; correct?

A. Yes, sir.

Q. I believe the time frame that we're talking about is probably March, late March of nineteen ninety-six; correct?

A. I'm not specific on dates, sir.

Q. Okay. In connection with your being allowed by the Court to act as your own counsel with the aid of Mr. Blischak, correct me if I'm wrong, you communicated with me by a letter in April of nineteen ninety-six, correct? Via letter?

A. I know I communicated with you by letter, I'm not sure the date.

[69] Q. Okay. And that letter you wrote me was basically an invitation for me to come up and see you in the Madison Street Jail to discuss something very important; correct?

A. Correct.

Q. Okay. That was a letter that was written by yourself; correct?

A. Yes.

Q. And it was delivered through the U.S. postal service to me; correct?

A. I'm assuming so, yes, sir.

Q. Well, in answer to that letter, I did write you back; fair statement?

A. Yes, sir.

Q. And indicated that I would accept your proposal and come up and speak with you about whatever it was that was important; correct?

A. Yes, sir.

Q. And when I spoke to you, it was with regard to the facts of this case, and about what you wanted to say with regard to your own case; fair statement?

A. Yes, sir.

Q. Okay. As a result of that initial meeting, I came back on two different occasions, and later Mr. Foreman and Mr. Hart came up to speak to you as [70] well; fair statement?

A. Yes, sir.

Q. And in connection with my second visit and third visit, I tape recorded you; correct?

A. Your second and third visit?

Q. Yes, sir.

A. I know one visit was tape recorded, I'm not aware of any more.

Q. Okay.

Subsequent to my visits with you, Mr. Ring had his trial; correct?

A. I don't recall that. I believe our discussions were before Mr. Ring's trial.

Q. Okay. But after our discussions, Mr. Ring has his trial; correct?

A. Correct.

Q. Okay. Thereafter, you are, after Mr. Ring's conviction, you are once again allowed to have counsel, or you petition to have counsel, and Mr. McVay is appointed, and you thereafter enter into this new plea; fair statement?

A. Correct.

Q. Okay. Part of your plea is certainly that you have stipulated to do twenty-seven point five years; correct?

[71] A. Yes, sir.

Q. You pled to second degree murder and two counts of armed robbery; correct?

A. Yes, sir.

Q. Okay. You have not been sentenced yet; correct?

A. No, sir, I have not.

Q. Okay. And correct me if I'm wrong, you're not going to be sentenced until you have absolutely lived up to the terms of the agreement and cooperated with the State; correct?

A. That's correct.

Q. And for the record, that cooperation entails your testifying certainly at this hearing against Mr. Ring; correct?

A. Yes, sir.

Q. And at any trial of Mr. Ferguson; correct?

A. Yes, sir.

Q. Okay. It also allows you to escape the death penalty though; correct?

A. Yes, sir.

Q. Now, Mr. Fenzel said on his direct, part of your agreement is that you tell the truth; correct?

A. Yes, sir.

Q. Okay. Let's talk about that a little bit.

[72] You have been provided with all of the police reports in this case. You early on participated in the motions relative to the wiretap; correct?

A. I'm assuming I was provided with all of the police reports, yes, sir.

Q. Okay. And I know, and in all fairness, at that early on stage in your case, you were not being provided with everything; fair statement?

A. Correct.

Q. Okay. Nonetheless, you know about the affidavits that have been filed in this case to get the wiretaps; correct?

A. Yes, sir.

Q. You know about the testimony related to those hearings and how those wiretaps came into effect; fair statement?

A. Yes, sir.

Q. Okay. You know that part of the probable cause to get the wiretap and to eventually put a hard wire into your apartment came from a young lady by the name of Judy Espinoza; correct?

A. Yes, sir.

Q. Now, who is Ms. Espinoza?

A. Associate.

Q. She was your girlfriend at the time; [73] correct?

A. I don't consider her a girlfriend, no, sir.

Q. She was not your girlfriend back in November of ninety-four, January-February of ninety-five?

A. I believe I met with her sometime in November and December of ninety-four. I don't recall ever being with her in January or February of ninety-five.

Q. Okay. Isn't it true that you lived with Ms. Espinoza until she threw you out in December of nineteen ninety-four?

A. Correct.

Q. Okay. Now, you know that she was one of the witnesses who came forth and was utilized in the wiretap affidavits in order to get the hard wire in your home; correct?

A. Correct.

Q. You know that her statement was that, quote, you came home in November of ninety-four at or near the day of the robbery and said, quote, I had to shoot somebody, end quote. Do you remember that?

A. I remember her statement, yes, sir.

Q. Are you denying that you ever made that statement?

[74] A. Yes, sir, I am.

Q. So that statement never occurred?

A. No, sir, it did not.

Appendix G

Q. Now, you have told us that you were present during the robbery at the Arrowhead mall; correct?

A. Yes, sir.

Q. And that robbery was the result of some planning that occurred at least on two occasions; correct?

A. Yes, sir.

Q. And you told us the people who were present at the plan and that there were two plans, one in early November of ninety-four, and one the afternoon before the robbery; correct?

A. Yes, sir, that's correct.

Q. And you also told us on questioning from Mr. Fenzel with regard to who was present, you said myself, Mr. Ring, Mr. Ferguson, quote, they were present at the physical assault itself, end quote. Do you remember that?

A. Repeat that, please.

Q. Well, you have distinguished between being present at the robbery and who was present during the planning, fair statement?

A. Correct.

[75] Q. Are there other people who were present during the planning that you haven't told us about?

Appendix G

A. No, there's not.

Q. Okay. Then what did you mean when you told Mr. Fenzel that no one else was present except myself, Mr. Ring and Mr. Ferguson at the physical assault itself?

A. Just what I said. No one was present during the physical assault of the armored car.

Q. And are you also telling us that nobody else at all ever was involved in the planning of the Arrowhead mall robbery?

A. I don't know that. Myself, Mr. Ring and Mr. Ferguson planned this robbery ourselves. I do not know if anyone else was involved.

Q. Okay.

Q. You told us that all the decision-making in this case was made by Mr. Ring; correct?

A. Yes, sir.

Q. You told us that he was, quote, the leader, end quote, right?

A. Yes, sir.

Q. Two trucks were used, your brown Chevy truck, and Mr. Ring's red Toyota truck; correct?

A. Yes, sir

Appendix G

[76] Q. You told us about the scenario of how you guys met at the mall, and you met there before because you've set up on this armored car; correct?

A. That's correct.

Q. You also told us about how you were parked at a forty-five degree angle from the armored van, and how Mr. Ring was approximately thirty to forty yards away. Fair statement?

A. During the assault?

Q. Yes, sir.

A. I never made that statement.

Q. Didn't you tell us on direct a few minutes ago that Mr. Ring was parked approximately thirty or forty yards west?

A. I stated that when we had surveilled the van, yes. I did not state that when we had made the assault.

Q. How far away was he when you did the actual assault?

A. I don't know.

Q. Okay. Isn't it true that you told Detective Clayton in February of ninety-five when you were arrested that Mr. Ring, quote, sniped Mr. Magoch from about a hundred and fifty feet away?

A. I don't recall making that statement.

Appendix G

[77] Q. Are you denying making that statement?

A. No, I'm not denying it. I'm saying I do not recall making that statement.

Q. You told us that you didn't know where Mr. Ring was at the time of the actual assault because you couldn't see him?

A. That's correct.

Q. You had a general idea though, correct?

A. For the purposes of the planning stages, yes.

Q. What angle was Mr. Ring, if at all?

A. I don't know.

Q. Okay.

A. Are you asking for the physical assault or planning stages?

Q. Yes, sir, physical assault.

A. I do not know.

Q. When you approached the van, you said you're at a forty-five degree angle from the van, correct?

A. Yes, sir.

Q. That Mr. Magoch opens his van about six to eight inches, the door, correct?

A. Yes, sir.

Q. And he turns sideways?

[78] A. Yes, sir.

Q. Correct?

A. Yes, sir.

Q. Now, when he is turned sideways, is he physically inside the van, or is he outside the van?

A. Part of his body is inside, part of his body is outside.

Q. What part is outside?

A. His head.

Q. So he's what, still sitting in his seat?

A. Yes, sir.

Q. Are his feet resting on the little van ledge there?

A. Yes, sir.

Q. And he's smoking a cigarette?

A. Yes, sir.

Q. And the door's open about six to eight inches?

A. Yes, sir.

Q. So that would place Mr. Ring somewhere off to the side of the van because this door is angled, right, six to eight inches?

A. Possibly.

Q. Okay. You said that you heard the shot break, or you heard the shot, and then you moved on the [79] van?

A. Correct.

Q. And you previously told us that when you approached the van, you pushed Mr. Magoch over, that nobody else is present at that point in time; correct?

A. During the assault?

Q. Yes, sir.

A. Correct.

Q. Nobody is coming out of the Dillard's, correct?

A. Not to my knowledge, no.

Q. Okay. And you simply push him over, get in the van and drive it away right then; correct?

A. Correct.

Appendix G

Q. You don't see anybody come out or exit before you leave; correct?

A. I don't recall seeing anybody.

Q. Okay. And you're dressed in your light blue windbreaker with your sunglasses on; correct?

A. Correct.

Q. You're not dressed in any type of an outfit with a badge or attempting to look like a driver; correct?

A. Correct.

Q. From there you drive to the church lot; [80] correct?

A. Yes, sir.

Q. Okay. You're alone in the van, correct, with the exception of Mr. Magoch?

A. Yes, sir.

Q. Okay. Nobody is sitting up on another seat in that van; correct?

A. Correct.

Q. Because there isn't another seat in that van; correct?

A. Correct.

Appendix G

Q. Okay. There was a milk crate in the front of that van; correct?

A. I don't recall.

Q. Okay. Your testimony is that, is that you are following Mr. Ring?

A. No.

Q. Okay. Mr. Ring is directing you somehow as to where to drive?

A. Correct.

Q. Okay. You're in the lead, and he's behind you in his red Toyota pickup truck; correct?

A. Correct.

Q. Mr. Ferguson is nowhere to be seen?

A. Correct.

[81] Q. Okay. He later comes upon you as you're finishing up offloading the money; correct?

A. Correct.

Q. Okay. From there you go to someplace out by Yarnell in the desert?

A. Correct.

Q. Okay. You told us that you were separating checks and cash; correct?

A. Yes, sir.

Q. Okay. What about coin?

A. Yes, sir, I believe we were separating some coin, yes.

Q. You told us about that you took the gun from Mr. Magoch, which you gave to Mr. Ring; correct?

A. Correct.

Q. Mr. Ring later throws it in some pond; correct?

A. Correct.

Q. From there you drive to Prescott, then back down to a Burger King, I-17 and into the Valley, correct?

A. Correct.

Q. You told us Mr. Ring is an excellent shot; fair statement?

A. Yes.

[82] Q. And that you went to a motel where you stayed the night, and Mr. Ring went home?

A. Yes, sir.

Q. You then you told us about the mood when everybody was counting the money; correct?

A. Yes, sir.

Q. You said everybody was pretty happy except for you, you were distraught?

A. Correct.

Q. You were the only one that was distraught?

A. I don't know.

Q. Okay. Were you on drugs at the time?

A. No, I was not.

Q. You didn't have a meth habit at this point in time?

A. No, I did not.

Q. Now, the scenario that we just went through which Mr. Fenzel went through with you earlier is basically the same scenario that you told Detective Clayton and Bruce Lowe; correct?

A. Correct.

Q. Okay.

We talked a little bit about my visit to you in April of ninety-six at the Madison Street Jail moments ago.

[83] A. Yes, sir.

Q. Do you remember my visit?

A. Yes, sir.

Q. Okay. Do you remember when I had some discussions with you about your statement given to Bruce Lowe and Tom Clayton back in February when you were arrested?

A. Yes, sir.

Q. Okay. Do you remember telling me at the time of that statement that you were under the influence of drugs and that you had been on a binge for three or four days?

A. Yes, sir.

Q. Was that true?

A. Yes, sir.

Q. Okay.

Do you remember telling me that because of the amount of drugs you had done, that you simply didn't remember a lot about what occurred on the specific day of the robbery?

A. I don't recall that statement.

Q. Okay. Do you deny that statement?

A. I don't recall that statement.

Q. Okay.

Do you remember telling me during our April [84] fourth of ninety-six interview that I tape recorded of you that most of the information that you gave to Detectives Clayton and Lowe was fed to you by those two officers? Do you remember saying that?

A. I don't recall.

MR. CLARK: May I approach the witness, Judge?

THE COURT: Yes.

BY MR. CLARK:

Q. I'm going to ask you to review a document and refresh your recollection.

For the record, it's page five of the interview of April fourth.

A. All right.

Q. Now, I've just showed you a transcript of our interview that occurred in the Madison Street Jail, and my question is, do you remember telling me that Detectives Clayton and Lowe were feeding facts of the case to you? Does this refresh your recollection with respect to that?

THE COURT: Did you answer that question?

THE WITNESS: No, sir, I did not.

MR. CLARK: I think he did. I asked him if he remembered.

[85] THE COURT: I didn't hear it. Is what I'm saying. I didn't hear him answer.

MR. CLARK: I'm sorry.

THE WITNESS: Would you please repeat the question?

BY MR. CLARK:

Q. Does this transcript refresh your recollection with respect to my earlier question about them feeding you facts?

A. Assuming that is a transcript of our conversation.

Q. Yes, sir.

A. Possibly.

Q. Do you have reason to doubt that this is the actual transcript of our conversation?

A. I have — I don't know. I don't have the tape to verify with the transcript itself.

Q. Okay. Having looked at this transcript, and aside from those feelings, are you telling me that you didn't tell me that Clayton and Lowe fed you those facts?

A. No, I'm not saying that.

Q. Okay.

Do you remember telling me that the scenario that you told Detective Clayton and Detective [86] Lowe, which is the same scenario that you've told us here today, that none of it was the truth?

A. Do I recall telling you that?

Q. Yes, sir.

A. Yes, I do recall that.

Q. Okay. Do you remember me asking the following question: Did the fact that Mr. Ring planned this robbery, was that something that was suggested to you or fed to you by either Bruce Lowe or Tom Clayton? Your answer: It was fed to me by Tom Clayton. Do you remember that question and that answer?

A. No, I do not.

Q. Are you denying them?

A. No, I am not.

Q. Okay.

A. I do not recall them.

Q. Do you remember the following question and your answer. This is a question by me, and it also occurs on April fourth, ninety-six: Your statements with respect to Tim Ring planning this you indicated were not true? Your answer: True. Your statement with respect to Tim Ring being present was not true? Your answer: Correct. Do you remember those questions and those answers?

A. Vaguely, yes, sir.

[87] Q. Okay. Are you telling me that you were being less than truthful with me back in April of ninety-six when I came up to interview you?

A. I'm telling you I was lying to you.

Q. Okay. At the point in time when I'm doing this April interview, you're certainly not under the influence of drugs, are you?

A. No, I'm not.

Q. At the time that you entered your plea and promised to be truthful, you're not under the influence of any types of drugs, are you?

A. No, I'm not.

Q. Then what is it about your statement today as opposed to your statement in April, ninety-six, to me, that makes either one of them believable?

A. The statement I gave to you in April was the fact of Mr. Ring's death threats and a concern for my family. I felt that if I made those statements that he would leave myself and my family alone.

Q. Okay. Let's talk about that for a minute. Mr. Ring's in the Madison Street Jail with you at the time; correct?

A. Correct.

Q. And you've told us that these threats, these alleged death threats were communicated to you by [88] jail personnel. They were relayed by someone else?

A. Correct.

Q. Okay. Who was that?

A. Jail intelligence.

Q. Guards?

A. Jail intelligence.

Q. Well, is that guards?

A. I don't know what their classification is.

Q. Detention officers?

A. I don't know what their classification is, sir.

Q. They're not inmates, are they?

A. No, sir, they're not.

Q. You're telling us that someone who works for the State came and said, hey, Tim Ring is making death threats at you so you better exonerate him; is that what you're saying?

A. No, sir, I'm not.

Q. What are you saying?

A. I'm saying that Mr. Ring made death threats against me, that's all I'm saying.

Q. And these death threats were supposedly related to you by jail personnel, somebody employed by the Madison Street Jail?

A. Correct.

[89] Q. And as a result of those death threats, you take it upon yourself to exonerate Mr. Ring and Mr. Ferguson, correct?

A. Yes, sir.

Q. Okay. Now, was this before or after you had entered your plea, or been allowed to withdraw from your plea?

A. I had already withdrawn from my plea at that point in time. I believe I had already withdrawn from my plea at that time. I'm not sure — I don't recall what the date was

when I withdraw from my plea. I believe it was a prior — I believe the date I withdrew from my plea was prior to our conversation.

Q. The person who communicated these alleged threats to you, was that a uniformed officer out of Madison Street Jail?

A. On one occasion, there was a sergeant and lieutenant who had told me about the death threats. On one occasion, there was a sergeant from jail intelligence that told me about the death threats.

Q. Okay. Both of these are uniformed individuals at Madison Street?

A. Two of them are uniform, one is not. She wears civilian clothing.

Q. Okay. And these officers came to you on [90] both of these occasions before or after you were allowed to withdraw from the plea?

A. I believe it was before I withdrew from my plea. Because that was the sole reason for me withdrawing from my plea was because of the death threats.

Q. Okay. Do you remember telling me back in April of ninety-six that your motivation for coming forth and telling the truth, your sole motivation was — strike that. Do you remember telling me back in April of ninety-six that your motivation at the time of your interview with Detective Clayton and Bruce Lowe where you incriminate Mr. Ring was to get revenge?

A. And it still is.

Q. Okay. And you told me back in April that you wanted to get revenge against Mr. Ring because, number one, you now had the opportunity to, and because of what he had done to you in ruining your relationship with your wife?

A. On top of that. And other death threats that he made against me.

Q. Okay.

THE COURT: Is this a good spot to break for lunch?

[91] MR. CLARK: Yes, Judge.

THE COURT: Let's break until one fifteen.

(Noon recess taken.)

THE COURT: Before we continue, here is Exhibit One, Greg. It is the DR. Have you looked at it?

MR. CLARK: Yes. I was given a copy earlier.

THE COURT: Are you saying that you've not seen this?

MR. CLARK: No. I have seen that, Judge.

THE COURT: Okay. So you had this before trial?

MR. CLARK: Yes.

THE COURT: Okay. All right. Go ahead.

BY MR. CLARK:

Q. Mr. Greenham, when we broke, we were talking a little bit about your reasons for testifying with respect to Mr. Ring, okay?

A. Correct.

Q. We were talking about your motives, whether you were doing it out of spite, out of vengeance, whatever, correct?

A. Pay back, correct.

Q. That's an interesting term, because when you walked into this courtroom this afternoon before we began, you voiced your concerns to Mr. Ring and said, [92] hey, this is pay back time?

A. That's right, I did.

Q. You're paying him back. You're acting out of vengeance?

A. That's right. I am. I would testify against Mr. Ring without a plea agreement and take the death penalty. I have no problem with it.

Q. Why did you enter a plea?

A. I was offered a plea, I took it.

Q. Okay. Let's talk a little bit about these alleged threats. You say that you first learned about these threats that were attributed from coming from Mr. Ring from a sergeant, among one other, a sergeant first; right?

A. A sergeant and lieutenant, yes, sir.

Q. What exactly did they say to you?

A. The lieutenant said that we had received information about Mr. Ring concerning the fact that he wanted to kill you, or the fact that there was a death threat against you, and that it came from Mr. Ring.

Q. Okay. So they're saying that — well, number one, they weren't passing you any type of a note or a kite or a message from Mr. Ring; correct?

A. Correct.

Q. Okay. They weren't giving you their [93] advice, correct, or their opinion?

A. Correct.

Q. They're saying, hey, we heard something through the grapevine, and Ring's out to get you?

A. Something like that, correct.

Q. Okay. Now, did they tell you from where they got their information, where it came from?

A. At one point in time, I don't remember if it was the second, if it was the lieutenant told me first, or the civilian sergeant, but one of them had told me that they had found a note in Mr. Ring's cell concerning a death threat. I don't recall when it was. It was the first time they told me or the second, I'm not sure.

Q. Okay. Did you ever get to see that note?

A. No, I have not.

Q. So you don't even know if it was addressed to you or it was about you or it was their opinion?

A. I saw the DR on it, that's all I've seen.

Q. Okay. A DR written by whom?

A. I believe it came from Glendale Police Department. I don't know who the writer of the DR was.

Q. Okay. You said that one of the people who gave you some information with respect to this threat was from a woman who's employed in the jail [94] intelligence. Was that the lieutenant or the sergeant?

A. That would be the sergeant, sir.

Q. Okay. Now, what exactly did she tell you?

A. She basically related the same information, that we had received information that Mr. Ring was coming after you. That there were death threats against you.

Q. That's all she told you, she didn't tell you from where it came?

A. No, she did not.

Q. She didn't say, hey, we searched his cell and found another note?

A. No, she did not.

Q. She didn't hand you a note directly to you?

A. No, she did not.

Q. She just said, hey, we have some information?

A. Correct.

Q. You don't know if it came from Ring, you don't know if it came from somebody else; correct?

A. Correct.

Q. Now, let's talk a little bit about an area that we previously spoke about is the shot. You say that you're in a position to hear the shot break, do you remember that?

[95] A. Yes, I do.

Q. You told us that you were standing outside of your vehicle, which is a Chevrolet pickup truck; correct?

A. Correct.

Q. You are located at a forty-five degree angle from the van that's parked in front of Dillard's, correct?

A. Correct?

Q. Approximately how far away are you?

A. Maybe thirty yards.

Q. Okay. And from this vantage point, you have — you told us that you don't know where Mr. Ring is?

A. That's correct.

Q. Okay. You're not focusing on him, certainly?

A. Correct.

Q. You're focusing entirely on the van, correct?

A. Correct.

Q. Do you hear this shot break out?

A. Correct.

Q. And you immediately move to the side of the van and the door?

[96] A. Correct.

Q. Okay. Where was Mr. Ferguson?

A. He was in my pickup truck.

Q. Where was — he was in that forty-five degree angle with you?

A. That's correct.

Q. Now, you've told us that this door — you've somehow figured out that this driver, Mr. Magoch, was a smoker, correct?

A. Correct.

Q. That the door was open approximately six to eight inches; correct?

A. About that, correct.

Q. And that he is sitting — is he sitting crosswise on his driver's seat when he's smoking with the door open, or is he facing straight ahead, or do you remember?

A. He's facing crosswise, so he's looking directly at me.

Q. His knees are pointing where?

A. Towards me.

Q. Towards you. So he is, just for purposes of illustration, sitting like this with the door open; correct?

A. That's correct.

[97] Q. When the shot breaks out, and you move?

A. That's correct.

Q. You're sure that's how it happened?

A. Yes, I am.

Q. Do you remember having a conversation with me wherein back in April of ninety-six that you were coming clean with respect to your prior statements simply because they were not correct?

A. I remember that comment, yes, I do.

Q. But that was not true?

A. Correct.

Q. Okay. You certainly — well, you told us that you were operating under this alleged threat from Mr. Ring; correct?

A. The threats, yes.

Q. That you were coming clean not because you wanted to but because you were afraid of Mr. Ring?

A. For my life and the sake of my family, yes.

Q. Okay. And you're coming forth at this point in time not because you're afraid of Mr. Ring but because you're operating under the benefit of a plea agreement; correct?

A. Not totally, no.

Q. Well, besides your opportunity to get back at Mr. Ring and pay him back; correct?

[98] A. That's correct.

Q. You remember telling me back in April of ninety-six that you had no idea how this event actually happened?

A. I don't recall that statement, no.

MR. CLARK: May I approach, Judge?

THE COURT: Yes.

BY MR. CLARK:

Q. I've just shown you a transcript of our April of ninety-six conversation at the Madison Street Jail, and with respect to my last question, does that refresh your recollection what you told me back then?

A. Assuming that's our actual conversation, no, I don't recollect.

Q. That you have no idea of the following: You have no idea how this event actually happened, do you? Your answer: No, I do not?

A. That's correct.

Q. Do you have a recollection of the following, also from the same interview at Madison Street: Your rendition of how

this event transpired and how Mr. Magoch was killed was simply said to appease the police? Your answer: Correct. Do you remember that question and that answer?

[99] A. No, I do not.

Q. Are you denying that you said that?

A. No, I am not. I'm just saying I do not remember.

Q. Do you remember the following question and your answer: You have no knowledge of Mr. Ferguson and Mr. Ring being involved in this homicide; is that correct? Your answer: Correct.

A. That sounds familiar. But I can't say one hundred percent that was my statement.

Q. Okay. Well, you weren't under the influence of drugs back then, were you?

A. No, I was not.

Q. You certainly weren't operating under the umbrella of a favorable plea agreement, were you?

A. No, I was not.

Q. I wasn't in any way coercing you, was I?

A. No, you were not.

MR. CLARK: If I could have a moment, Judge, I will be done.

I have nothing additional, thank you, Judge.

THE COURT: Mr. Fenzel.

[100] **REDIRECT EXAMINATION**

BY MR. FENZEL:

Q. Mr. Greenham, we've today talked a little bit about it, Mr. Clark talked about the statements you gave to police. You gave a statement on the sixteenth of February of nineteen ninety-five. That was the date that you were arrested; is that correct?

A. Correct.

Q. Then you spoke to Mr. Clark sometime in April of nineteen ninety-six?

A. Correct.

Q. You gave other statements to the police, didn't you?

A. Yes, sir, I did.

Q. You gave a statement to the police on or about March first, nineteen ninety-five, did you not? Let me — the date that you went with the police to the lake and to Yarnell?

A. Yes, sir, I did.

Q. Assume for a moment that was March first, nineteen ninety-five?

A. If that was the date, yes, sir.

Q. Did you in fact give the police information and speak to the police on that date?

A. Yes, sir, I did.

[101] Q. There was an attorney there present with you?

A. Yes, sir.

Q. And that was Mr. Blischak?

A. Yes, sir.

Q. What, if anything, did you tell the police on those days about your involvement, Mr. Ring's involvement, and Mr. Ferguson's involvement, if any, in the Arrowhead robbery on the twenty-fourth — twenty-eighth of November, nineteen ninety-four?

A. I don't recall actual getting into discussion of the actual robbery itself. I recall discussing to Detective Clayton the fact where the gun was at.

Q. You actually showed him the lake?

A. Yes.

Q. Gave directions to the lake?

A. Yes.

Q. Actually gave directions to the field to Yarnell?

A. Yes.

Q. On the way to Yarnell?

A. Yes, sir. I believe those were the only conversations we talked about. What happened at the burn site and what happened at the pond.

[102] Q. You also spoke in an interview with Detective Clayton and myself, Mr. Blischak, and investigator Hanratty on or about September fifteen, nineteen ninety-five?

A. Correct.

Q. What, if anything, did you tell the detectives and myself on that date?

A. I gave the entire details of the full armored car robbery. Of how it happened, who was involved.

Q. And who did you say was involved?

A. Mr. Ring and Mr. Ferguson.

Q. You said no one else was involved; is that correct?

A. That's correct.

Q. You've given other statements in the months of August, nineteen ninety-seven, to various attorneys?

A. Yes.

Q. You were interviewed over at the Madison Street Jail by Mr. Foreman, Mr. Hart?

A. Yes, sir.

Q. And others?

A. Of nineteen ninety-seven?

Q. This year, couple of months ago?

A. Yes, sir. Yes, sir. They interviewed me, [103] yes.

Q. You spoke to Mr. Clark at the beginning of September, nineteen ninety-seven, also, in the jail?

A. I believe he was there. I don't recall him asking any questions.

Q. Do you remember Mr. Clark seeing you about a month or so ago in the jail, over in the old jail?

A. Oh, yes, okay. I recall now, yes, sir. All right.

Q. What did you tell him then?

A. Aspects of the case, armored car robbery.

Q. Have you ever gotten any kites from Mr. Ring?

A. Numerous.

Q. What's a kite?

A. It's a form of a letter, a note.

Q. And what if anything did those letters and notes from Mr. Ring want you to do?

MR. CLARK: Objection, Judge, lacks foundation as to when.

THE COURT: Sustained.

BY MR. FENZEL:

Q. When did you get the kites?

A. I believe it was — there was numerous kites [104] probably the month of the time that I took the second plea agreement, and I received one letter from Mr. Ring just after I was arrested. Just after we were arrested for this crime.

Q. What, if anything, did Mr. Ring want you to do?

MR. CLARK: Judge, I would object once again as to lack of foundation. How would he know they came from Ring?

THE COURT: Sustained.

BY MR. FENZEL:

Q. Did these letters come from Mr. Ring?

A. Yes, sir, they did.

Q. How did you know they came from Mr. Ring?

A. Mr. Ring gave them directly to me.

Q. What did Mr. Ring want you to do?

A. One of the letters, or a letter and a copy was an affidavit that he had typed up stating that he wanted me to sign the affidavit so he can give it to Mr. Clark, which was basically exonerating him from the robbery and implicating myself and Mr. Sanders.

Q. Did you sign that and date it?

A. No, sir, I did not.

Q. Why didn't you sign it?

[105] A. Because it wasn't a true statement. It was a fact, Mr. Ring just wanted to get off so he can get out.

Q. Mr. Clark asked you some questions about your motive for testifying today and mentioned pay back time?

A. That's correct.

Q. Is what you're saying now happened, or is there some other motive for your testifying today?

A. Other than the fact that he's threatened me on numerous other occasions, the fact he's held a gun to my head, threatened to blow my head off. The fact he's threatened to kill my family. He is wanting to kill my family. I say that's pay back enough.

Q. Is what you told the Judge with respect to what happened in the Wells Fargo robbery true or not?

A. That's a true fact.

MR. FENZEL: That's all. Thank you, Mr. Greenham.

THE COURT: All right.
Thank you, sir, you can stand down. Go ahead.

MR. FENZEL: Judge, can I just have a couple of seconds to make sure Doctor Keen is here?

[106] THE COURT: Yolie says he is.

MR. FENZEL: Can I just get him?

THE COURT: Yes.

MR. FENZEL: I'm sorry, Judge.

THE COURT: Do you need Mr. Greenham?

MR. FENZEL: No.

THE COURT: Come on up, Doctor Keen, and be sworn.

PHILIP KEEN,

a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FENZEL:

Q. Doctor Keen, you testified in the trial of Mr. Ring; is that correct?

A. Yes, sir, I did.

Q. And you testified basically from the reports of Doctor Bolduc who actually did the autopsy in this case?

A. That is also correct.

Q. Following the trial, did you do additional work on this case, or following your testimony, did you do additional work?

A. Yes, sir, I've looked at additional [107] photographs in conjunction with this case, and also reviewed the report again.

Q. And have you reviewed any medical slides or anything like that?

A. Yes, I have done that as well.

* * *

Appendix G

[128] WILLIAM MORRIS,

a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FENZEL:

Q. Will you please tell us your name?

A. William H. Morris, Junior.

Q. Mr. Morris, you work for the Arizona Department of Public Safety Crime Lab, do you not?

A. I do, sir.

Q. And you are one of the people that testified in the trial of Mr. Timothy Ring?

A. I was, yes.

Q. This past summer in June of nineteen ninety-seven, did you obtain a slide from the Maricopa County Medical Examiner's Office relating to Mr. John Magoch?

[129] A. A slide was brought to me by Detective Clayton, yes, sir.

Q. What were you asked to do with that particular slide from the Medical Examiner's Office?

Appendix G

A. I was asked to look at a particle on it and determine whether it was gunpowder or not.

Q. How did you go about doing that?

A. I first looked at the slide using the low power stereo scopic microscope, and I located the particle, it was very small, so we then looked at it under a higher magnification microscope.

Q. And you have training and experience in doing this thing as far as identifying gunpowder on wounds and things like that?

A. Yes, sir.

Q. And were you able to determine whether or not in your opinion this was gunpowder?

MR. CLARK: I would ask for a little bit more foundation.

THE COURT: Sustained.

MR. FENZEL: All right. What training and experience do you have with respect to identifying particles of gunpowder?

A. As part of my training in firearm [130] examination, I was trained to identify gunpowder particles, to identify gunpowder residues microscopically and chemically. I attended a week long FBI course in gunpowder residue examination. I reload my ammunition. As part of my job, I supervise a criminalist who does explosive analysis. We frequently encounter gunpowder, bombs, things like that.

Appendix G

Q. What experience do you have with granules or generally identifying granules of gunpowder?

A. I've looked at numerous items of clothing that had gunpowder residues on them, and have had to examine the basic types of gunpowder.

Q. Are you able to identify types of gunpowder from that type of examination?

A. I'm able to identify the general type by the shape. As far as identifying a particular brand of gunpowder, you can't do it just by a microscopic examination.

Q. Are you trained to actually identify different brands of gunpowder by a single grain?

A. I do that by assigning the case to Don Christian, who can do that. But he does it instrumentally.

Q. And how many cases have you had an occasion to try to identify whether or not a substance is gun [131] powder or not?

A. Numerous, sir. In excess of a hundred, I would say.

Q. How long have you been with the Department of Public Safety Crime Lab?

A. For twenty-five years, sir.

Appendix G

Q. And has your duty for that twenty-five years partly been involved in identifying whether or not a substance is gunpowder?

A. It's a regular part of every firearm examination we do. We look at the gunpowder residues in a gun barrel, and I do primarily firearm identifications.

Q. And how often have you done that over your twenty-five years with DPS?

A. I would imagine in excess of a thousand, maybe two thousand times, sir.

Q. And are you able to tell by looking at something through a microscope based on your training and experience whether or not something has the characteristics of being gunpowder?

A. Yes, sir.

Q. And did you do that in this case?

A. Yes, sir.

Q. And based on your training and experience, [132] what, if anything, were you able to tell about the item that you looked at in the microscope in this case?

* * *

Supreme Court, U.S.
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(7)

No. 01-488

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether Arizona's capital sentencing statutory scheme, under which, according to the Arizona Supreme Court, the maximum "punishment allowed by law on the basis of the verdict alone is life imprisonment" and "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death" (Pet. App. 25a), contravenes the right to jury trial guaranteed by the Sixth Amendment and made applicable to the States through the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	9
ARGUMENT	14
I. THE ARIZONA CAPITAL PUNISHMENT SENTENCING SCHEME VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.	14
II. THE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN *APPRENDI* APPLY TO CAPITAL SENTENCING	24
CONCLUSION	40

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Apprendi v. New Jersey, 530 U.S. 466 (2000)	*passim*
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)	31
Commonwealth v. Hollinger, 42 A. 548 (Pa. 1899)	27
Enmund v. Florida, 458 U.S. 782 (1982)	6, 9
Furman v. Georgia, 408 U.S. 238 (1972)	29, 30, 31
Hildwin v. Florida, 490 U.S. 638 (1989)	23
Jones v. United States, 526 U.S. 227 (1999)	3, 6, 15, 16, 20, 21, 22, 23
Lowenfield v. Phelps, 484 U.S. 231 (1988)	34
McMillan v. Pennsylvania, 477 U.S. 79 (1986)	15
Mullaney v. Wilbur, 421 U.S. 684 (1975)	18
Spaziano v. Florida, 468 U.S. 447 (1984)	23, 29
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Stringer v. Black, 503 U.S. 222 (1992)	18
Tison v. Arizona, 481 U.S. 137 (1987)	6, 9

Page

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United States Constitution:

Sixth Amendment ..... *passim*

Eighth Amendment 6, 12, 31, 32

Fourteenth Amendment ..... *passim*

Page

Statutes:

21 U.S.C. § 841 19

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Pa. Laws of 1794, ch. 257, §§ 1, 2 27

Ariz. Rev. Stat. Ann. § 13-703 ..... *passim*

Ariz. Rev. Stat. Ann. § 13-703.01 6

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Ariz. Rev. Stat. Ann. § 13-1105(C) 17, 19

2001 Ariz. Laws, ch. 260, § 1 2

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Rev. Code Ariz., 1928 § 4585 30

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Rev. Code Ariz., 1939 § 43-2903 30

Rev. Stat. of Ariz., 1913, Penal Code Preface 30

	Page
1917 Ariz. Laws, Initiative and Referendum Measures	30
1973 Ariz. Laws, ch. 138	30
1977 Ariz. Laws, ch. 142	30
Ala. Code § 13A-5-40(a)	34
Ala. Code § 13A-5-40(a)(14)	34
Ala. Code §§ 13A-5-43 – 13A-5-52	38
Ark. Code Ann. §§ 5-4-602 – 5-4-605	37
Cal. Penal Code §§ 190.1 – 190.4	37
Colo. Rev. Stat. § 16-11-103	38
Conn. Gen. Stat. § 53a-46a	37
Del. Code Ann., tit. 11, § 571	29
Del. Code Ann. tit. 11, § 636	35
Del. Code Ann., tit. 11, § 3901	29
Del. Code Ann. tit. 11, § 4209	35, 38
Del. Code Ann. tit. 11, § 4209(d)	35

	Page
Del. Code Ann. tit. 11, § 4209(e)(1)(g)	34
Fla. Stat. § 921.141	33, 38
Ga. Code Ann. §§ 17-10-30 – 17-10-31	37
Ga. Code Ann. § 17-10-30(b)	33
Idaho Code § 19-2515	38
Ind. Code. Ann. § 35-50-2-9	38
Kan. Stat. Ann. §§ 21-4624 – 21-4626	37
Ky. Rev. Stat. Ann. § 532.025	37
La. Code Crim. Proc. Ann. arts. 905, 905.1 – 905.8	37
Md. Ann. Code art. 27, § 413	37
Miss. Code Ann. § 99-19-101	37
Mo. Rev. Stat. § 565.030	37
Mo. Rev. Stat. § 565.032	37
Mont. Code Ann. §§ 46-18-301 – 46-18-306	38
N.C. Gen. Stat. § 15A-2000	38
Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2523	38

	Page
Nev. Rev. Stat. Ann. § 175.552	37
Nev. Rev. Stat. Ann. § 175.554	37
Nev. Rev. Stat. Ann. § 175.556	37
Nev. Rev. Stat. Ann. § 175.558	37
Nev. Rev. Stat. Ann. § 200.030	37
Nev. Rev. Stat. Ann. § 200.033	37
Nev. Rev. Stat. Ann. § 200.035	37
N.H. Rev. Stat. Ann. § 630:5	37
N.J. Stat. Ann. § 2C:11-3	37
N.M. Stat. Ann. § 31-18-14	37
N.M. Stat. Ann. § 31-20A-1	37
N.M. Stat. Ann. § 31-20A-2	37
N.M. Stat. Ann. §§ 31-20A-3 – 31-20A-6	37
N.Y. Penal Law § 125.27	37, 38
N.Y. Crim. Proc. Law § 400.27	38
Ohio Rev. Code Ann. §§ 2929.03 – 2929.05	38

	Page
Ohio Rev. Code Ann. § 2929.022	38
Okla. Stat. tit. 21, §§ 701.9 – 701.13	38
Or. Rev. Stat. § 163.095	38
Or. Rev. Stat. § 163.150	38
S.C. Code Ann. § 16-3-20	38
S.C. Code Ann. § 16-3-25	38
S.D. Codified Laws §§ 23A-27A-1 – 23A-27A-6	38
Tenn. Code Ann. §§ 39-13-202 – 39-13-204	38
Tex. Penal Code Ann. § 19.03	38
Tex. Crim. Proc. Code Ann. art. 37.071	38
Tex. Crim. Proc. Code Ann. art. 37.071(2)	33
Tex. Penal Code Ann. § 19.03(a)	33
Utah Code Ann. §§ 76-3-206 – 76-3-207	38
Utah Code Ann. § 76-30-4	29
Va. Code Ann. §§ 19.2-264.2 – 19.2-264.4	38
Wash. Rev. Code §§ 10.95.020 – 10.95.080	38
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Page

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Page

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OPINIONS BELOW

The opinion of the Arizona Supreme Court (Pet. App. 1a-44a) is reported at 25 P.3d 1139 (Ariz. 2001). The judgment of the Superior Court of Maricopa County (Pet. App. 45a-53a), is unreported.

STATEMENT OF JURISDICTION

The judgment of the Arizona Supreme Court was entered on June 20, 2001. The petition for a writ of certiorari was filed on September 18, 2001, and granted on January 11, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of Arizona law, Ariz. Rev. Stat. Ann. §§ 13-703 and 13-1105 (West 2001), are set forth at Pet. App. 54a-61a.[1]

STATEMENT OF THE CASE

This case raises the question of whether the right to jury trial, guaranteed by the Sixth and Fourteenth Amendments, is violated by the Arizona statutory scheme for sentencing of a defendant found guilty of first degree murder, under which, according to the Arizona Supreme Court, the maximum "punishment allowed by law on the basis of the verdict alone is life imprisonment" and "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." Pet. App. 25a (*citing* Ariz. Rev. Stat. Ann. § 13-703(B)).

This Court upheld the Arizona capital sentencing scheme in *Walton v. Arizona*, 497 U.S. 639 (1990). However, this Court later ruled, in *Apprendi v. New Jersey*, 530 U.S. 466

1. In 2001, Ariz. Rev. Stat. Ann. § 13-703 was amended to add a new subsection B, which prohibited the execution of mentally retarded defendants. 2001 Ariz. Laws, ch. 260, § 1. The subsequent statutory subsections were renumbered accordingly. *See* Ariz. Rev. Stat. Ann. § 13-703 (West Supp. 2001) (historical and statutory notes). Because the opinion of the Arizona Supreme Court in this case refers to the version of § 13-703 as it existed before the 2001 amendment, this brief also cites to that version.

(2000), that the Sixth and Fourteenth Amendments require a jury to find, beyond a reasonable doubt, any fact that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 494. While conceding that *Apprendi* and *Jones v. United States*, 526 U.S. 227 (1999), "raise some question about the continued viability of *Walton*" (Pet. App. 23a), the Arizona Supreme Court rejected petitioner's claim that *Apprendi* had overruled *Walton*, holding that such a determination was solely the province of this Court. Pet. App. 27a.

A. Under Arizona law, if a jury returns a guilty verdict in a first degree murder case, the judge must conduct a hearing – in the absence of the jury – to determine whether the defendant is eligible for the death penalty. Ariz. Rev. Stat. Ann. § 13-703(B) (Pet. App. 54a-55a). For the death penalty to be imposed, the judge must find that the State has proved at least one of ten statutory aggravating factors beyond a reasonable doubt. Pet. App. 26a.[2] The Arizona Supreme Court has authoritatively interpreted the Arizona statute to mean that, as a matter of state law, "a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." Pet. App. 25a.

2. Aggravating factors include: (i) that the defendant committed a previous offense (Ariz. Rev. Stat. Ann. § 13-703(F)(1), (F)(2)), (ii) that the defendant knowingly created a grave risk of death to persons other than the decedent (§ 13-703(F)(3)), (iii) that the defendant procured the commission of the offense by payment (§ 13-703(F)(4)), (iv) that the defendant committed the offense in expectation of the receipt of anything of pecuniary value (§ 13-703(F)(5)), (v) that the defendant committed the offense in an especially heinous, cruel or depraved manner (§ 13-703(F)(6)), (vi) that the defendant committed the offense while incarcerated or on parole (§ 13-703(F)(7)), (vii) that the defendant has been convicted of other homicides committed during the commission of the offense in question (§ 13-703(F)(8)), (viii) that the defendant was an adult at the time of the offense and the victim was under fifteen or over seventy (§ 13-703(F)(9)), and (ix) that the victim was an on duty peace officer (§ 13-703(F)(10)). Pet. App. 57a-58a.

Rather, under Ariz. Rev. Stat. Ann. § 13-703(B), the court alone makes all factual determinations as to whether any of the listed aggravating circumstances exist. Pet. App. 25a. At the post-trial hearing, the State may present, and the judge may consider, evidence never heard by the jury. Ariz. Rev. Stat. Ann. § 13-703(C) (Pet. App. 55a-56a). If the judge does not find at least one aggravating factor, the defendant may only be sentenced to life imprisonment. Pet. App. 26a. "[T]he death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present." *Id.* If the judge finds an aggravating circumstance, he must next determine whether there are mitigating circumstances. Ariz. Rev. Stat. Ann. § 13-703(E) (Pet. App. 56a). If he finds mitigating circumstances, the judge "must then weigh them against the aggravators and decide by 'special verdict' whether a death sentence is appropriate." Pet. App. 26a. *See* Ariz. Rev. Stat. Ann. § 13-703(D), (E) (Pet. App. 56a).

B. An Arizona Superior Court jury found petitioner guilty of felony first degree murder, based on circumstantial evidence of his participation in the planning of a robbery of an armored van in which the van's driver was shot and killed. Pet. App. 7a. All twelve jurors found petitioner guilty of felony murder; the jury split six to six as to petitioner's guilt of premeditated murder. Pet. App. 46a.[3]

At the post-trial sentencing hearing before the judge, the State presented evidence in support of two claimed statutory aggravating circumstances: (1) that petitioner committed the offense as consideration for the receipt, or in the expectation of the receipt, of pecuniary gain; and (2) that petitioner committed the offense in an especially heinous, cruel or depraved manner. J.A. 32a; Pet. App. 8a. The State's chief

3. Petitioner was also convicted of conspiracy to commit armed robbery, armed robbery, burglary and theft. Pet. App. 2a.

witness at the sentencing hearing was an alleged accomplice to the charged crime, James Greenham, who offered testimony the trial jury never heard.[4] Greenham testified that petitioner led the planning of the robbery, shot the armored van's driver, and subsequently asked to be "congratulated" on his shot. J.A. 40a, 41a, 64a-65a.[5]

After the hearing, the trial judge returned a "special verdict" pursuant to Ariz. Rev. Stat. Ann. § 13-703(D), finding both claimed statutory aggravating circumstances. Pet. App. 45a-53a. In so finding, the trial court rejected petitioner's vigorous attack on Greenham's credibility:

> The Court is mindful in determining the facts . . . that Mr. Greenham's credibility as a witness is an issue and that Mr. Greenham's testimony regarding the statement is uncorroborated. The Court has had occasion to observe Mr. Greenham while testifying and accordingly to assess his believability concerning whether the Defendant in fact made the statement attributed to him above. The Court has considered Mr. Greenham's demeanor while testifying along with all the other evidence in the case and resolves that Mr. Greenham is credible . . .

Pet. App. 50a. *See also* J.A. 70a-108a. The judge also rejected petitioner's contentions that Greenham was the shooter and

4. Greenham, who did not testify at trial, entered into a plea bargain after the jury verdict. J.A. 37a-38a, 76a-77a.

5. The other two witnesses at the sentencing hearing were experts who had testified at trial as to various aspects of the victim's wounds. Each was called to clarify issues presented at trial and to report on additional testing and analysis performed since the trial. J.A. 115a-119a.

that petitioner was not shown to have been at the scene of the robbery. Pet. App. 52a.[6]

After finding the two statutory aggravating factors, the trial judge went on to consider potential mitigating circumstances. The judge found no statutory mitigating factors and only one non-statutory mitigating factor – petitioner's lack of a prior criminal record. Pet. App. 51a-53a. Holding that there were "no mitigating circumstances sufficiently substantial to call for leniency," the trial court sentenced petitioner to death. Pet. App. 53a.

C. Arizona law provides for an automatic appeal to the State Supreme Court in all death sentence cases. Ariz. Rev. Stat. Ann. § 13-703.01 (West 2001). Petitioner argued on appeal that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendment principles articulated in *Jones* and *Apprendi* by removing from the jury the determination of the facts necessary to allow the imposition of the death penalty. Pet. App. 23a. The State countered that *Walton* was "still the controlling authority on point." *Id.*

Since this Court had "refrained from overruling *Walton*" in *Apprendi*, the Arizona Supreme Court felt "bound" to reject petitioner's argument. Pet. App. 26a-27a. However, because *Jones* and *Apprendi* raised "some question about the continued viability of *Walton*" (Pet App. 23a), the Arizona Supreme Court proceeded to set forth a "further explication"

6. The trial court also held that petitioner was "the one who killed" the van driver, was a "major participant in the armed robbery," and acted with "a reckless disregard for human life." Pet. App. 47a. Since petitioner had been convicted only of felony murder, these findings were necessary under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), to allow imposition of the death penalty consistent with the requirements of the Eighth and Fourteenth Amendments.

of "the practical operation of Arizona's death penalty scheme, as applied under the peculiar facts of the present case." Pet. App. 24a.

The Arizona Supreme Court began by examining *Apprendi*'s attempted distinction of *Walton*. The Court noted that *Apprendi* had described the Arizona capital sentencing scheme at issue in *Walton* as one that "merely 'requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death,' and not as a system that 'permits a judge to determine the existence of a factor which makes a crime a capital offense.'" Pet. App. 24a (*quoting Apprendi*, 530 U.S. at 496-97). The Court also noted that Justice O'Connor had dissented from this characterization of Arizona law, describing as "'demonstrably untrue'" the notion that in Arizona "'the jury makes all of the findings necessary to expose the defendant to a death sentence.'" Pet. App. 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)).

The Arizona Supreme Court then confirmed that, as a matter of state law, the Arizona capital sentencing scheme was "precisely as described in Justice O'Connor's dissent – Defendant's death sentence required the judge's factual findings." Pet. App 26a. The Court explained that, contrary to the *Apprendi* dictum, under Arizona law the maximum "punishment allowed by law on the basis of the verdict alone" is life imprisonment, and that "[i]t is only after a subsequent adversarial sentencing hearing, at which the judge alone acts as the finder of the necessary statutory factual elements, that a defendant may be sentenced to death." Pet. App. 25a (*citing* Ariz. Rev. Stat. Ann. § 13-703(B)); *see also* Pet. App. 26a ("when the state seeks the death penalty, a separate evidentiary hearing, without a jury, must be held; the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present").

The Arizona Supreme Court then made plain, both as a matter of state law and as a matter of fact, that petitioner could not have been sentenced to death under Arizona law based on the evidence at trial. It started from the premise that the evidence adduced at trial "only proved that Defendant helped plan the robbery. None of it, however, linked Defendant to the act of killing [the driver]." Pet. App. 28a. As the Court explained:

> Although the trial evidence established Defendant's participation in planning the robbery and his further participation in concealing the proceeds from the crime, it provided almost nothing about why [the driver] was killed or who carried out the murder. There also was no evidence at trial to establish even reckless indifference. For all we know from the trial evidence, Defendant did not participate in, plan, or even expect the killing. This lack of evidence no doubt explains why the jury found Defendant guilty of felony, but not premeditated, murder.

Pet. App. 29a.

Nonetheless, the Arizona Supreme Court upheld petitioner's death sentence, relying on the testimony presented by Greenham at the sentencing hearing. Under Arizona's statutory scheme, "[w]hen imposing sentence in a capital case, the trial judge does not rely exclusively on the evidence admitted at trial but also takes into consideration the evidence presented at the sentencing hearing." Pet. App. 29a. The Court found that Greenham's sentencing hearing testimony supported the trial judge's finding that petitioner had "planned on robbing an armored car," had "taken the role as leader" and had "shot" the driver.

Pet. App. 29a.[7] Expressly citing Greenham's testimony, the Supreme Court therefore upheld the trial court's finding of at least one aggravating factor – that the murder was done for pecuniary gain. Pet. App. 34a.[8] Based on that conclusion, and finding that "the mitigating evidence is not sufficient to call for leniency" (Pet. App. 38a), the Supreme Court upheld petitioner's death sentence. Pet. App. 40a.[9]

SUMMARY OF ARGUMENT

I.

Apprendi v. New Jersey, 530 U.S. 466 (2000), held that the Sixth and Fourteenth Amendments require a jury to find, beyond a reasonable doubt, any fact that would "expose the

7. The Arizona Supreme Court relied entirely on the Greenham testimony to uphold the trial court's *Enmund/Tison* findings. Pet. App. 27a-29a.

8. Under Arizona law, "[a] murder committed in the context of a robbery or burglary is not per se motivated by pecuniary gain." *State v. Sansing*, 26 P.3d 1118, 1124 (Ariz. 2001). Rather, "the State must prove beyond a reasonable doubt that pecuniary gain was a motive, cause or impetus for the murder and not merely the result of the murder." *Id.* (internal quotation marks omitted). "Whether the needed connection exists between expected pecuniary gain and the motive for killing involves a highly fact-intensive inquiry." *Id.* at 1125. The jury in this case was not instructed to, and therefore did not make, any findings with respect to the pecuniary gain issue. *See* J.A. 17a-30a (jury instructions).

9. The Arizona Supreme Court held, however, that the second aggravating factor found by the trial court (that the murder was committed in a heinous or depraved manner) was not established by the record. The Court concluded that, even accepting the factual validity of Greenham's testimony about petitioner's alleged post-crime bragging, those comments did not meet the legal definition of heinous or depraved. Pet. App. 29a-33a.

defendant to a greater punishment than that authorized by the jury's verdict." *Id.* at 494. The Arizona capital sentencing scheme falls afoul of the *Apprendi* rule. The maximum punishment allowed by the jury's verdict under state law was "imprisonment for 'natural life' without the possibility of release." Pet. App. 25a. For a defendant to receive the plainly "greater punishment" of death, Arizona law requires the trial judge to make a factual finding after a post-verdict sentencing hearing that at least one of ten statutory "aggravating" factors is present. "[T]he death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present." Pet. App. 26a.

The State's attempted distinctions of *Apprendi* are unavailing. The State suggests that a trial judge may find the critical facts that allow a death sentence because death is within the "range" of sentences allowed for first degree murder in Arizona. Resp. Br. in Opp. 9. But this argument misapprehends the holding in *Apprendi*, under which the relevant inquiry is whether a factual finding exposes a defendant to a greater sentence than that allowed by the *jury's verdict alone*. *See Apprendi*, 530 U.S. at 494. Under Arizona law, petitioner's death sentence was not possible by virtue of the jury verdict alone, but instead was imposed because of factual findings made entirely by the trial judge. Pet. App. 28a-34a.

Nor can *Apprendi* be distinguished on the ground that the Arizona statutory "aggravating" circumstances are "sentencing factors," rather than "elements" of the crime. *Apprendi* expressly rejects this argument, holding that the "relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. The opinion below makes clear that factual findings made by a judge exposed petitioner to a greater punishment than that allowed under Arizona law by the jury's guilty verdict alone.

The Arizona Supreme Court felt bound to uphold petitioner's death sentence in light of *Walton v. Arizona*, 497 U.S. 639 (1990), since *Apprendi* refrained from expressly overruling *Walton*. But it is now clear that *Walton* is no longer viable. In discussing *Walton*, *Apprendi* suggested in dictum that the Arizona capital sentencing scheme merely "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and does not "permit[] a judge to determine the existence of a factor which makes a crime a capital offense." *Apprendi*, 530 U.S. at 496-97 (internal quotation marks omitted). But the Arizona Supreme Court has now characterized as "'demonstrably untrue'" the claim that "'in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence.'" Pet. App. 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)). Rather, the Court made plain that it is the judge's factual finding that subjects the defendant to a death sentence under Arizona law, a holding that places this case squarely under the *Apprendi* rule.

In any event, wholly apart from the Arizona Supreme Court's authoritative construction of state law, the core Sixth Amendment principles articulated in *Apprendi* make plain that *Walton* can no longer stand. The right to trial by jury simply has "no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (emphasis in original). Thus, even if under Arizona law the jury verdict could somehow be construed to make petitioner "eligible" for a death sentence, the same result would nonetheless obtain. The Sixth Amendment right to jury trial entitles a defendant to have a jury, not a judge, find all facts necessary for the imposition of the maximum sentence allowed by law. Arizona's capital sentencing scheme denied that right to petitioner, and his sentence therefore cannot stand.

II.

No exception should be carved out of the constitutional rule announced in *Apprendi* for death penalty cases. The historical understanding that underlies *Apprendi* applies with full force to capital sentencing. It was well understood at the time the Sixth Amendment was adopted that a jury was required to find the facts necessary to subject a criminal defendant to the maximum sentence allowed by law. The practice with respect to capital homicide was identical – a jury was required to determine whatever facts were necessary under the applicable state law to subject a defendant to a sentence of death.

The Sixth Amendment's guarantee of a jury trial is not rendered inapplicable here merely because Arizona, like many other States, has reacted to this Court's Eighth Amendment jurisprudence by requiring the finding of specific "aggravating" factors in order to impose a death sentence. Viewed in its historical context, this recent redefinition of capital homicide is nothing new; the process of adding to the quantum of facts necessary to allow capital punishment has continued throughout the common law and this Nation's history. Nothing in that process – or the most recent changes made by some States to the definition of capital murder – undermines the core guarantee of the Sixth Amendment that a jury must find whatever facts the State deems necessary to subject a defendant to the maximum sentence allowed by law.

Indeed, any separate rule for capital cases would lead to unjustifiable results. The States are free to adopt capital sentencing systems in which aggravating factors are "contained in the definition of the crime or in a separate sentencing factor (or in both)." *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). Under respondent's test, a State that chose to set forth a specific factor defining capital homicide

(for example, the murder of a witness in order to prevent his testimony) in its technical definition of the crime would be required to prove that "element" to a jury beyond a reasonable doubt before imposing a death sentence. In another State that made the identical fact a sentencing "aggravating factor," respondent's approach would allow the defendant to be sentenced to death solely on the basis of a judge's factual finding. *Apprendi* rejects the notion that the Sixth Amendment right to jury trial applies differently to identical factual findings depending on the happenstance of when in the proceedings they occur, focusing instead on the practical effect of the finding – whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494.

Contrary to the State's suggestion, *Apprendi* does not require "jury sentencing" or deprive the states of the ability effectively to administer capital punishment. *Apprendi* requires only that a jury find the facts necessary to subject a defendant to the maximum sentence allowed by law; a judge may thereafter impose a sentence on the basis of those facts and whatever other considerations are relevant under the law. *Apprendi*, 530 U.S. at 481. Twenty-nine of the thirty-eight states that authorize the death penalty for some form of homicide – and the United States – now have systems under which the jury is directed to find the "aggravating circumstances" necessary to allow capital punishment. It is thus entirely possible to have a constitutional capital sentencing system that allows for the exercise of discretion by the trial judge, and at the same time complies with *Apprendi*'s requirement that a jury find the facts that subject the defendant to the maximum sentence allowed by law.

ARGUMENT

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held unconstitutional a statutory sentencing scheme that allowed factual findings made solely by a judge to "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494. This case is controlled by both the language and logic of *Apprendi*. Arizona law, as authoritatively interpreted by the State's Supreme Court, allowed petitioner to be sentenced to death solely on the basis of factual findings made by a judge. Capital punishment was, as a matter of state law, not available on the basis of the jury's verdict alone. But even in the absence of the "explication" of Arizona law in the opinion below, the same result would obtain. Because the Sixth Amendment right to jury trial "means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury," *id.* at 499 (Scalia, J., concurring (emphasis in original)), petitioner's death sentence cannot stand.

I. THE ARIZONA CAPITAL PUNISHMENT SENTENCING SCHEME VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. *Apprendi* involved a New Jersey defendant who pleaded guilty to possession of a firearm for illegal purposes, a crime punishable under state law by a maximum term of ten years. *Apprendi*, 530 U.S. at 469-70. However, relying on New Jersey's "hate crime" law, which permitted an "extended term" of imprisonment when certain defendants act with a racially biased purpose, the sentencing court imposed a term of imprisonment of twelve years on the firearms charge. *Id.* at 470-71. The defendant contended that the imposition of the increased prison term on the basis of factual findings by the trial judge violated the Fourteenth Amendment.

In considering that claim, this Court began from the fundamental principle that a criminal defendant is entitled under the Sixth and Fourteenth Amendments to a trial by jury in which a guilty verdict must be premised on proof beyond a reasonable doubt. The Court then noted that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Id.* at 478 (footnote omitted). The "historic link between verdict and judgment," *id.* at 482, and the traditional inability of a judge to impose a sentence outside "the range of sentencing options prescribed by the legislature," *id.* at 481, highlighted the constitutional "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83 (emphasis in original).

The Court therefore held, as it had suggested the previous Term in *Jones*, that the Sixth and Fourteenth Amendments required a jury to find, beyond a reasonable doubt, any fact that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Id.* at 494. Since the finding of racial motivation by the *Apprendi* trial judge had precisely that effect, the defendant's sentence could not stand.

In so holding, this Court expressly rejected the argument that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), required a different result. Rather, the Court limited the holding of *McMillan* "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. In such cases, a finding by a judge of a "sentencing factor" could be the basis of a punishment

decision. In all other cases, however, the issue was not whether a particular fact could be technically called a "sentencing factor" or an "element" of the offense. "[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. *See also id.* at 499 (Scalia, J., concurring) (the Sixth and Fourteenth Amendment right to jury trial "means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury") (emphasis in original); *id.* at 521 (Thomas, J., concurring) (the right to jury trial mandates that a fact must be found by a jury beyond a reasonable doubt if it is "by law the basis for imposing or increasing punishment").

B. The opinion of the Arizona Supreme Court makes clear that this case fits squarely within the *Apprendi* rule:

> In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings. The range of punishment allowed by law on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for "natural life" without the possibility of release.

Pet. App. 25a. Rather, under Arizona law, a defendant can receive a death sentence only if the trial judge makes the factual finding that at least one of the statutory aggravating factors in Ariz. Rev. Stat. Ann. § 13-703 (Pet. App. 54a-60a) is present. Pet. App. 26a. If the trial judge so finds, he must then determine whether there are any mitigating circumstances. *Id.* If so, he must weigh those mitigating circumstances against any aggravating factors in deciding whether to impose the death penalty.

In short, the opinion below confirmed that Arizona law is "precisely as described in Justice O'Connor's [*Apprendi*] dissent – Defendant's death sentence *required* the judge's factual findings." Pet. App. 26a (emphasis added).[10] This is thus the paradigm of a case where the factual findings made by a judge, not a jury, "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494. *Apprendi* teaches that such a regime violates the Sixth Amendment.

C. The State's primary argument is that *Apprendi* is inapplicable because death is within the "range" of sentences for felony first degree murder in Arizona under Ariz. Rev. Stat. Ann. § 13-1105(C).[11] Resp. Br. in Opp. 9. This argument fails.

The definitive interpretation by the Arizona Supreme Court of the relevant statute is directly to the contrary. Ariz. Rev. Stat. Ann. § 13-1105(C) does *not* simply provide that first degree murder is punishable by a range of sentencing from life to death. Instead, as the final phrase in the statute makes plain, death is only available as a sentence "*as provided by § 13-703.*" Pet. App. 61a (emphasis added). That statute, in turn, only allows the imposition of a death

10. *See Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting) (decrying as "demonstrably untrue" any claim that "in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence." Rather, "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.")

11. Ariz. Rev. Stat. Ann. § 13-1105(C) provides that "First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by § 13-703." Pet. App. 61a.

sentence when a *judge* finds one or more statutory aggravating circumstances. Pet. App. 54a-60a. The Arizona Supreme Court made the point as clearly as possible: "The range of punishment allowed by law on the basis of the verdict alone [i.e., the conviction of first degree murder] is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of release." Pet. App. 25a. *See Stringer v. Black*, 503 U.S. 222, 234-35 (1992) (state supreme court's view as to the meaning of its own capital punishment law is conclusive); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (Supreme Court bound by state supreme court's interpretation of its homicide statute).

The Arizona statutory scheme is thus in substance no different from that in *Apprendi*, where the jury's verdict confronted the defendant with at most ten years in prison for the weapons violation, and the more lengthy sentence was possible only when a judge found the existence of an "aggravating" factor – racial motivation. Just as the New Jersey defendant had formal statutory notice in *Apprendi* that he might be subjected to a term of twenty years if a judge found that his offense was a "hate crime," petitioner had formal statutory notice that he might be subjected to a death sentence if a judge found the presence of an "aggravating" factor. But *Apprendi* does not turn on such niceties of statutory "notice." Instead, it holds that the Sixth Amendment right to jury trial necessarily encompasses the right to have a jury find, beyond a reasonable doubt, those facts that allow an increase in a sentence beyond that allowed by the jury verdict alone.

In the end, the State is reduced to arguing that the statutory aggravators in Ariz. Rev. Stat. Ann. § 13-703 are "sentencing factors," and not "elements" of first degree murder. Resp. Br. in Opp. 8. But, as noted above, *Apprendi* eschews such an approach, holding that the "relevant inquiry

is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.[12] The concurring opinions put the point even more forcefully, declaring "that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury," *id.* at 499 (Scalia, J.), and that "[i]f a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element." *Id.* at 521 (Thomas, J.). The finding of an aggravating factor – which was necessary to increase petitioner's sentence from life to death – thus plainly falls within the *Apprendi* rule.[13]

The only remaining possible difference between this case and *Apprendi* is that New Jersey codified the "hate crime" aggravator in a different statute from the one defining the underlying crime. As an initial matter, it should be noted that Arizona has done much the same. While Ariz. Rev. Stat. Ann. § 13-1105(C) provides that first degree murder is punishable by "death or life imprisonment," it goes on to

12. Every federal court of appeals to address the issue in the context of the federal drug-trafficking statute has declined to read *Apprendi* in the fashion suggested by the State. These courts have held that a jury must determine the drug quantities necessary to subject a defendant to the applicable maximum sentence under 21 U.S.C. § 841 (LEXIS through Pub. L. No. 107-136). *See United States v. Promise*, 255 F.3d 150, 156-57 (4th Cir. 2001) (*en banc*) (collecting cases), *petition for cert. filed*, No. 01-6398 (U.S. Sep. 20, 2001); *United States v. Vazquez*, 271 F.3d 93, 98-99 (3d Cir. 2001) (*en banc*); *United States v. Thomas*, 274 F.3d 655, 662-63 (2d Cir. 2001) (*en banc*).

13. Justice O'Connor, while dissenting in *Apprendi*, recognized as much: "In real terms . . . the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive [the death sentence]." *Apprendi*, 530 U.S. at 541 (dissenting opinion).

state "as provided by § 13-703" (Pet. App. 61a); different parts of the state code thus define first degree murder and the aggravating factors necessary for the greater sentence. This is precisely the New Jersey statutory scheme involved in *Apprendi*. But more importantly, since *Apprendi* warns that the inquiry is one of substance, not of form, this is a distinction without a difference.[14] *Jones* makes the same point. Although the federal carjacking statute at issue in that case included a range of sentences in a single code provision, this Court construed the law to set forth three separate offenses, in order to avoid the very constitutional question posed in *Apprendi*. *Jones*, 526 U.S. at 251-52.

D. The Arizona Supreme Court was constrained to affirm petitioner's death sentence because of *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld Arizona's capital punishment scheme against a Sixth Amendment attack. Pet. App. 27a. It is plain, however, that in light of *Apprendi*, *Walton* no longer withstands scrutiny.

Indeed, even before *Apprendi*, *Jones* presaged the demise of *Walton*. At least one member of the Court suggested in *Jones* that while it was not necessary in that case to decide the continued vitality of *Walton*, the latter "should be

14. *See Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting):

> The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here – apart from the magnitude of the punishment at stake – is that New Jersey has not prescribed the 20-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

See also id. at 543 (suggesting that the constitutional principle in *Apprendi* must therefore be "more far reaching").

reconsidered in due course." *Jones*, 526 U.S. at 253 (Stevens, J., concurring). The *Jones* majority, likewise, emphasized that a "careful reading of *Walton*'s rationale" was necessary to avoid serious constitutional questions. *Id.* at 251. *See also id.* at 272 (Kennedy, J., dissenting) (noting that *Walton* was "a better candidate" for the application of the rule announced in *Jones*).

Apprendi suggested in dictum that *Walton* could be distinguished because the Arizona system merely "requir[es] judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death," and did not "permit[] a judge to determine the existence of a factor which makes a crime a capital offense." *Apprendi*, 530 U.S. at 496-97 (internal quotation marks omitted). But such a characterization of the Arizona system is no longer possible. The opinion of the Arizona Supreme Court quoted directly from Justice O'Connor's dissent, which characterized as "'demonstrably untrue'" the claim that "'in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence.'" Pet. App. 25a (*quoting Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)). The state court concluded that Justice O'Connor's description of Arizona law was precisely correct – the maximum sentence available on the basis of the jury verdict is life. Pet. App. 26a. Thus, it can simply no longer be contended that an Arizona trial judge is merely exercising a "choice between a greater and a lesser penalty," *Jones*, 526 U.S. at 251, in imposing a death sentence. Rather, the death sentence becomes a possibility under Arizona law only if the judge finds the requisite aggravating factors; if the judge does not, death is not within the range of permissible sentences. Pet. App. 25a.

Indeed, even the *Apprendi* dissenters did not contest this point; all joined Justice O'Connor's conclusion that *Walton* cannot be effectively distinguished. *Apprendi*, 530 U.S. at

538-39 (O'Connor, J., dissenting, joined by the Chief Justice, Kennedy, J., and Breyer, J.). *See also id.* at 537 (O'Connor, J., dissenting). ("If a State can remove from the jury a factual determination that makes the difference between life and death . . . it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence"); *Jones*, 526 U.S. at 272 (Kennedy, J., dissenting) ("If it is constitutionally impermissible to allow a judge's finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge's finding may increase the maximum punishment for murder from imprisonment to death").[15] Now that the Arizona Supreme Court has removed any doubt that the majority's suggested distinction fails, there is simply no basis for continued adherence to *Walton*.

E. While the authoritative interpretation of state law by the Arizona Supreme Court makes plain that petitioner's death sentence violates the Sixth Amendment, the same result would obtain even in the absence of the detailed "explication" of Arizona law provided by the opinion below. *Walton* is flatly inconsistent with the basic Sixth Amendment principles confirmed in *Apprendi*. As Justice Scalia emphasized, the guarantee of jury trial in the Sixth Amendment necessarily includes "the right to have a jury determine those facts that determine the maximum sentence the law allows." *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring). The right to trial by jury simply has "no intelligible content unless it means that

15. *See also* Brief of the United States in *Apprendi v. New Jersey*, No. 99-478, 2000 WL 194804, at *24 (Feb. 14, 2000) ("It would be a strange constitutional regime that permitted [judges to make findings essential before a defendant may be sentenced to death], yet precluded a legislature from specifying a statutory enhancement factor that raised the sentencing range available to a judge in imposing a term of imprisonment").

all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury." *Id.* (emphasis in original).

In the end, therefore, the relevant inquiry is not whether state law makes a defendant "eligible" for a death sentence after a jury verdict. The question instead is whether a jury has found all facts necessary under state law to subject the defendant to the imposition of a particular sentence. However the effect of the jury's guilty verdict is characterized as a matter of Arizona law, it is indisputable that the trial judge, not the jury, found the facts necessary to permit the imposition of capital punishment. That procedure violates the Sixth Amendment, and since *Walton* holds otherwise, it is plainly vitiated by *Apprendi*.[16]

16. To the extent that *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), suggest that a death sentence may be imposed solely on the basis of factual findings made by a judge, they are also inconsistent with the rule in *Apprendi*. *But see Spaziano*, 468 U.S. at 458 (noting that the "fundamental premise" of petitioner's argument in that case was that the "capital sentencing decision is one that, in all cases, should be made by a jury," and that petitioner did not urge "that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan v. Louisiana*"); *Jones*, 526 U.S. at 250-51 (noting that *Hildwin* "could not drive the answer to the Sixth Amendment question" posed by the Government's interpretation of the federal carjacking statute, since "[i]n *Hildwin*, a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved").

II. THE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN *APPRENDI* APPLY TO CAPITAL SENTENCING.

Respondent suggests that capital punishment should somehow be excepted from the constitutional rule announced in *Apprendi*. Resp. Br. in Opp. 15-16. But nothing in the language of the Sixth Amendment authorizes such an exception. Indeed, it would be strange if the Sixth Amendment's jury trial guarantee protected a defendant against an increase of two years in the sentence allowed on the basis of the jury's findings alone, but provided no protection against an increase in the sentence allowed by such findings from life to death.[17]

In any event, there is no reasoned basis for a Sixth Amendment distinction between capital sentencing and sentencing for a term of years. *Apprendi* makes plain that if the State seeks the maximum punishment allowed by law for a crime – either a term of years or death – the jury must find all facts necessary to allow the imposition of that punishment. Therefore, the "aggravating" factors necessary to a sentence of death in Arizona must be found by the jury.

A. *Apprendi* rests upon the settled historical understanding of the right to jury trial embodied in the Sixth Amendment, and the notion that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted). The State does not contend, nor could it, that the understanding of the Framers differed

17. *Cf. Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.")

in any way between crimes involving punishment for a term of years and those involving capital punishment.

It was well understood both in the common law and at the time of the adoption of the Sixth Amendment that a jury's guilty verdict with respect to the crime of capital homicide included within it all factual findings necessary to allow the imposition of a death sentence. When the right to jury trial first became entrenched in England in the thirteenth century, all forms of culpable homicide were capital offenses. *See* Thomas A. Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800 30 (1985). Thus the jury's verdict of guilt in any homicide case established all facts necessary to subject the defendant to a sentence of death.

Over the ensuing centuries, the common law refined the definition of capital homicide, by requiring the finding of additional facts as a prerequisite to the imposition of a death sentence. Simple homicide, or "manslaughter," was distinguished from capital homicide, or "murder," and the death penalty was only available for the latter. *Id.* at 122. A defendant could not be convicted of "murder" and sentenced to death unless the indictment specified – and the jury found beyond a reasonable doubt – the additional fact of "malice aforethought." *See* 2 J. Bishop, New Commentaries on The Criminal Law ("Bishop") § 726(3) (8th ed. 1892); American Law Institute, Model Penal Code and Commentaries (1980) ("MPC") § 210.2, Commentary pp. 13-14. Thus, the increase in the quantum of facts necessary to establish capital murder had no effect on the underlying right to trial by jury.

By 1791, when the Sixth Amendment became law, the right of the jury to make the factual determinations that would determine whether a defendant could be subjected to capital

punishment was "particularly well established." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L. Rev. 1, 10 (1989).[18] *See also Walton*, 497 U.S. at 710-11 (Stevens, J., dissenting). The understanding of the Framers of the Sixth Amendment with respect to capital cases was thus precisely the same as their understanding with respect to cases involving lesser punishments. That understanding plainly precluded a "legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83 (emphasis in original).[19]

B. Rather than question the historical record, the State seems instead to suggest that the Sixth Amendment guarantee of jury trial no longer applies to all facts necessary for the imposition of a death sentence, because some States have recently expanded that list of facts by adding so-called "aggravating" factors. Resp. Br. in Opp. 13-14. But neither the fact of such statutory amendments nor the States' motivations in enacting them take "aggravating" factors outside the guarantee of the right to jury trial.

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18. To the extent that they specifically addressed the jury's function in capital cases, Colonial and State laws of the period reflected an even *higher* valuation of the jury's function in such cases than in other cases, by giving capital defendants special rights to make challenges. *See* The Complete Bill of Rights 404, 408 (N. Cogan ed. 1997) (quoting colonial laws of New-Plimouth and New Jersey).

19. Indeed, the hotly-contested issue with respect to the proper scope of the jury's powers during this period was not whether the jury's historical *fact-finding* power could be infringed, but rather whether the jury should wield the power to find the *law* as well. *See* White, *supra*, at 11-14.

1. As noted above, the quantum of proof necessary to establish capital homicide changed throughout the common law. This process of change has continued in the United States since the founding of the Republic. Shortly after the Constitution was adopted, Pennsylvania in 1794 pioneered the division of murder into "degrees." Pennsylvania's statute defined capital "first-degree" murders as those "'perpetrated by means of poison, or by lying in wait, or by any kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary.'" MPC § 210.6, Commentary p. 123 (*quoting* Pa. Laws of 1794, ch. 257, §§ 1, 2). (Under the common law, any murder was treated as capital as long as it fell under the broad category of malice aforethought[20] or was committed in connection with any felony.[21]) The new Pennsylvania statute required the proof of additional facts – that the murder was committed either pursuant to a deliberate or premeditated scheme or in connection with specific enumerated felonies. *See* MPC § 210.6, Commentary p. 123; *see also* Jo Anne C. Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 Am. J. Crim. L. 249, 251-52 (1975-76). But, while the Pennsylvania law effectively redefined capital murder, it did not affect the defendants' right to jury trial; the added facts were required to be found by the jury beyond a reasonable doubt in order to subject a defendant to a death sentence.[22]

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20. *See* MPC § 210.2, Commentary p. 14.

21. *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.5(a) (1986). There was no need to limit the felonies that would suffice to establish felony murder in the early common law, because at the time "all felonies were punishable by death, so it made little difference whether the felon was hanged for the felony or for the murder." *Id.* n.4.

22. *See, e.g., Commonwealth v. Hollinger*, 42 A. 548 (Pa. 1899) (jury instructed that "before they could convict of murder in the first degree they must be satisfied that the killing was willful, deliberate, and premeditated") (internal quotation marks omitted).

The approach of dividing murder into "degrees," only the highest of which was treated as capital, became predominant in nineteenth century America. *See* MPC § 210.6, Commentary pp. 123-24. But it was hardly the only change to the common law. Many States altered their definitions of first-degree murder, typically by adding to the set of factual findings necessary to subject a defendant to a death sentence. The "willful, deliberate or premeditated" formula introduced by Pennsylvania in 1794 eventually was recast into a variety of more or less elaborate *mens rea* requirements incorporated in State codes. *See* 2 LaFave & Scott, *supra*, § 7.7 n.36. Some States adopted felony murder rules different from Pennsylvania's, either by limiting capital murder to different enumerated felonies, or to "inherently dangerous" felonies, or by eliminating the rule altogether. *See id.* § 7.5; *see also* Adlerstein, *supra*, at 251-68. Some states then further refined their criminal codes by treating homicides as first degree murder upon proof of a number of more specific facts, such as that the victim was a police officer, that the murder was committed for pay, or that the killer had a prior murder conviction. *See* LaFave & Scott, *supra*, § 7.7 & nn.57-62.[23] But throughout this process of

23. The development of New York's first-degree murder statute between the mid-nineteenth century and the early 1970s provides an illustration of the sort of modifications and refinements that occurred. New York first enacted a law separating murder into two degrees, only one of which would be capital, in 1860. *See* James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 Alb. L. Rev. 515, 519 & n.23 (1990). After a portion of that statute was declared unconstitutional, the State enacted a revised version in 1862. *See id.* n.23. Twenty years later, the State made the definition of first-degree murder more specific by including references to premeditated, depraved mind, felony and arson homicides. *See id.* Fifteen years after that, the State added homicide by train wrecking to the definition. *See id.* In 1965, while leaving its definition of first degree murder intact, the State restricted capital punishment for such murders to cases in which the victim was an (Cont'd)

change, one thing appears to have remained constant: However the State chose to define capital murder, the facts deemed necessary to subject the defendant to the maximum penalty were found by the jury. *See* John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. Miami L. Rev. 643, 649-52, 660 (1990).[24]

This historical process of change has continued apace in the thirty years since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).[25] In order to comply with the Eighth Amendment, some States once again added to the quantum of facts needed to establish capital homicide, so as

(Cont'd)
on-duty peace officer or the perpetrator was serving a life sentence. *See id.* at 525. Two years later, the State eliminated the degree structure, but retained the limitation of capital punishment to those two situations. *See id.* at 527. In 1971, the State added on-duty prison guards to the class of victims whose murder would be treated as capital. *See id.* at 528.

24. Indeed, among the forty-one jurisdictions that employed discretionary capital punishment at the time of *Furman*, even the two that permitted a death sentence to be imposed without the consent of a jury still required the jury to make all of the factual findings that would render the death penalty an available punishment. *See Spaziano*, 468 U.S. at 472 & n.8 (Stevens, J., concurring in part and dissenting in part) (*citing Witherspoon v. Illinois*, 391 U.S. 510, 525-27 & nn.2-8 (1968) (opinion of Douglas, J.)); Del. Code Ann., tit. 11, §§ 571, 3901 (West Supp. 1970) (death penalty available upon conviction of first degree murder but jury that convicts defendant can issue non-binding recommendation of mercy); Utah Code Ann. § 76-30-4 (1953) (same).

25. *See generally* Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 Wm. & Mary Bill Rts. J. 345, 397-430 (1998) (listing various additions of "aggravating factors" in State death penalty statutes over this period).

to provide a basis for reasoned distinctions among those defendants convicted of first degree murder.[26] However, the vast majority of States that did so entrusted the duty of finding these "aggravating" facts to the jury. *See* Poulos, *supra*, at 659-60.[27] Thus, the fact that States have recently changed their statutory definitions of capital murder, in and of itself, does not argue that the historical understanding of the jury trial guarantee in the Sixth Amendment has also somehow thereby been altered.

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26. Arizona's experience parallels the historical record of change. Arizona's first Penal Codes were copied almost in their entirety from the Penal Code of California (*see* Rev. Stat. of Ariz., 1913, Penal Code Preface), and included that State's Pennsylvania-style definition of first-degree murder, *see id.* § 172, and its specification that the penalty of death could be imposed for that crime "at the discretion of the jury trying the same." *Id.* § 173. Following a brief abolishment of the death penalty between 1916 and 1918 (see 1917 Ariz. Laws, Initiative and Referendum Measures, at 4-5; 1919 Ariz. Laws, Initiative and Referendum Measures, at 17-21), Arizona reenacted essentially the pre-existing provisions regarding first-degree murder and the death penalty, which remained virtually unchanged through 1973. *See* Rev. Code of Ariz., 1928 §§ 4584, 4585; Ariz. Code, 1939 §§ 43-2902, 43-2903. Arizona then adopted its most recent version of its capital murder statutes (based largely on the Model Penal Code). 1973 Ariz. Laws, ch. 138. Amendments enacted in 1977 and succeeding years have added definitions, altered the *mens rea* requirement, and modified the list of felonies that may establish felony murder. *See* 1977 Ariz. Laws, ch. 142; Ariz. Rev. Stat. Ann. § 13-1105 (West 2001) (historical and statutory notes).

27. As of 1990, only four States (Arizona, Idaho, Nebraska, and Montana) with post-*Furman* death penalty statutes had assigned the determination of whether aggravating circumstances existed entirely to the court. *Id. See also infra* nn.35-37 (twenty-nine of the thirty-eight States with death penalties (and the federal Government) currently assign fact-finding function as to existence of aggravating circumstances to jury; only five States assign such fact-finding entirely to the court).

2. The State's argument may be that the post-*Furman* additions to the list of facts defining capital murder in Arizona and other States are without the Sixth Amendment's guarantee of jury trial because they were primarily motivated by this Court's Eighth Amendment jurisprudence. *See* Resp. Br. in Opp. 13-17. However, the particular motivations for the most recent changes in the States' listing of the quantum of facts necessary to establish capital homicide provide no reasoned basis for distinguishing *Apprendi*.

While it may be assumed that the States have made many of these changes in their capital homicide statutes in order to comply with the Constitution, there is no logical reason why findings of fact required under these amended statutes are entitled to less Sixth Amendment weight than the findings required by the States for other reasons. Any rule to the contrary would mean that a defendant in one State would be entitled to a jury trial with respect to a fact that the State included within its definition before or after *Furman* of capital murder for any number of public policy purposes (such as whether the defendant knew the victim was a police officer), while a defendant in another State could be denied the right to jury trial because the latter State identified exactly the same fact as a "narrowing" factor in reaction to *Furman*, in order to assure that its death penalty statute complied with the constitutional prohibition against cruel and unusual punishment. Not only would such an approach lead to unjustifiable distinctions, it would embroil this Court in difficult State-by-State analyses as to whether a particular change in a State's definition of capital homicide was prompted by a desire to adhere to the Eighth Amendment, or by some other motivation.[28] Most disturbingly, the State's

28. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("it is virtually impossible to determine the singular 'motive' of a collective legislative body, and this Court has a long tradition of refraining from such inquiries") (internal citations omitted).

suggested distinction between capital cases and all others would treat changes to criminal statutes undertaken by the States to comply with their constitutional duties as somehow entitled to less Sixth Amendment import than those prompted by other reasons.

Nothing in the Sixth Amendment or *Apprendi* justifies such an approach. Rather, *Apprendi* rests on the core principle, fully understood by the Framers and embodied in the Sixth Amendment, that the guarantee of trial by jury includes the right to have a jury find all facts required by state law to subject the defendant to a particular punishment, including a sentence of death. There is simply no warrant in *Apprendi*, in history, or in logic, for treating the factual findings necessary to impose a sentence of death in a constitutionally different fashion from those that increase a possible term of imprisonment from ten to twelve years.[29] Whatever a State's particular motivation for its definition of capital murder, the facts necessary to allow the imposition of that sentence are required by the Constitution to be found by the jury.

C. We have responded above (*see* pp. 18-19, *supra*) to the State's argument that the Arizona aggravators are "sentencing factors," and therefore outside the protection of the Sixth Amendment; it is plain that *Apprendi* forecloses this argument. But it is also worth noting that this argument, if adopted, would create practical dysfunction and manifest unfairness in the administration of capital punishment.

Current state death penalty systems can be divided into at least two broad primary types. *See* James R. Acker and

29. The four *Apprendi* dissenters rejected any notion that the restrictions imposed by the Eighth Amendment on a state legislature's ability to define capital crimes should relegate capital defendants to different treatment under the majority's rule. *See Apprendi*, 530 U.S. at 539 (O'Connor, J., dissenting).

C.S. Lanier, *Capital Murder From Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 Crim. L. Bull. 291, 298-302 (1993). The first type defines first degree murder generically and then limits death penalty eligibility to those convicted of that crime where the state can also prove at sentencing at least one statutory aggravating factor. *Id.* at 298-99. Such systems rely primarily on the sentencing process to narrow and define the group of defendants subject to the death penalty. *Id.* The Arizona system is an example of this type of scheme; Florida and Georgia are others.[30]

The second type of state capital system has more specific statutory definitions of "capital" murder. *Id.* at 300-01. Under these systems, the statutory distinction between capital murder and other first-degree murder begins the process of determining who may be subject to the death penalty. Texas is an example of this type of system. Texas law limits capital homicide to several specific types of aggravated criminal homicide.[31] The initial phase of the trial thus establishes the defendant's guilt of a potentially capital crime; in the post-verdict proceeding, the jury decides the issue of capital punishment by first answering two limited questions, and, when all are answered in the affirmative, then deciding whether sufficient mitigating circumstances exist to warrant a sentence of life rather than death.[32]

30. *See* Fla. Stat. § 921.141 (LEXIS through 2001 Legis. Sess.); Ga. Code Ann. § 17-10-30(b) (LEXIS through 2001 Ext. Legis. Sess. Gen. Assemb.).

31. *See* Tex. Penal Code Ann. § 19.03(a) (LEXIS through 1999 Legis. Sess.).

32. The questions are: (1) is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (2) did the defendant kill deliberately. *See* Tex. Crim. Proc. Code Ann. art. 37.071(2) (LEXIS through 2001 Legis. Sess.).

The States are free to choose either of these approaches, or some other variant. *See Tuilaepa*, 512 U.S. at 972 ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988) (aggravating circumstances may be found "at either the sentencing phase of the trial or the guilt phase"). Under the pragmatic test articulated in *Apprendi*, a defendant has the right to trial by jury under any system chosen by the State with respect to the finding of statutory "aggravating circumstances," for "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494.

However, under the State's suggested approach, which distinguishes "elements" from "sentencing factors" purely on the basis of when in the proceeding the particular finding of fact is made, the defendant's Sixth Amendment right to jury trial would turn on a particular State's choice of capital punishment sentencing system. Thus, a defendant in Texas would have the right to jury trial with respect to a specified "element" of aggravated capital murder, while a defendant in another state which considered an identical "aggravating factor" only in the sentencing stage would be deprived of the right to jury trial.[33]

33. The Alabama and Delaware capital sentencing schemes provide an example of the problems with the rule urged by the State. Each State has chosen to include in the group of murder defendants who may be sentenced to death those who killed a witness to a crime for the purpose of preventing his appearance or testimony in any court proceeding involving that crime. *See* Ala. Code § 13A-5-40(a)(14) (LEXIS through 2001 Legis. Sess.); Del. Code Ann. tit. 11, § 4209(e)(1)(g) (LEXIS through 2001 Legis. Sess. 141st Gen. Assemb.). However, Alabama statutorily defines specific "capital offenses" (*see* Ala. Code § 13A-5-40(a)), while Delaware broadly

(Cont'd)

There is no reason for this Court to adopt such an artificial constitutional construct. *Apprendi* teaches that however a relevant fact is formally denominated, whether as an "element" or a "sentencing factor," the Sixth Amendment right to jury trial obtains if that fact is necessary to allow a sentence greater than that possible on the basis of the jury's verdict alone.[34]

(Cont'd)
defines first degree murder (*see* Del. Code Ann. tit. 11, § 636) and primarily defines death penalty eligibility through proof of aggravating circumstances at a sentencing hearing (*see id.* § 4209). Under the State's suggested construct, Alabama has defined killing of a witness as an "element" of one form of capital murder, while Delaware has defined killing of a witness as a "sentencing factor." The distinction would be critical for Sixth Amendment purposes, because in Delaware the court, not a jury, determines the existence of aggravating circumstances. *See* Del. Code Ann. tit. 11, § 4209(d). Thus, even though each State made an identical policy choice with respect to the inclusion of a factor among those which subject a defendant to a death sentence, the constitutional rights of defendants in the two States would be quite different under respondent's suggested approach.

34. The State also argues that Justice Thomas' *Apprendi* concurrence establishes that the rule of that case "likely" has no application to capital sentencing. Resp. Br. in Opp. 15. This argument, however, confuses *reserving* a question with *deciding* one. In fact, Justice Thomas urged an even "broader rule than the Court adopts" – that "[i]f a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element" of the crime and must be found by the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 499, 521 (Thomas, J., concurring). As Justice Thomas noted, since *Walton* approved "a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment," *id.* at 522, it is facially inconsistent with his proposed rule. However, noting that this Court had constrained the States' ability automatically to impose a death penalty simply upon conviction of certain crimes,

(Cont'd)

D. Finally, the State suggests that "broader consequences" somehow militate against application of the *Apprendi* ruling to capital punishment. Resp. Br. in Opp. 12. In large part, these supposed "consequences" simply do not exist; in any event, the argument provides no basis for excluding capital cases from the Sixth and Fourteenth Amendment principles articulated in *Apprendi*.

For example, the State cautions that if petitioner is successful, juries will be required to consider not only all statutory "aggravating factors," but also all mitigation evidence, and judges will be barred from imposing a lesser sentence than the statutory maximum. *Id.* But nothing in *Apprendi* requires such a result. Rather, the Sixth and Fourteenth Amendments only require that the jury *find* any fact (other than prior conviction) that is necessary to subject the defendant to the maximum prescribed statutory punishment. Nothing in *Apprendi* requires jury *sentencing* or prevents a State from granting discretion to a trial judge to impose less than the maximum possible sentence. *See Apprendi*, 530 U.S. at 481 ("We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute") (emphasis in original)); *id.* at 498 (Scalia, J., concurring) (a defendant may receive a sentence less than the maximum from a "tenderhearted judge").

The State next warns that the supposed benefits of judicial sentencing in capital cases will be lost in the absence of a special exception to the rule announced in *Apprendi*.

(Cont'd)
Justice Thomas simply left for "another day" the question of "[w]hether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated." *Id.* at 523.

Resp. Br. in Opp. 13. To the extent that this argument rests on the State's misreading of *Apprendi* described above, no lengthy response is necessary. The States remain fully able under *Apprendi* to employ any number of models of judicial sentencing; what they are not free to do is to remove from the jury's fact-finding obligation those facts that will increase a sentence beyond that allowed by the verdict of guilt alone.

To the extent that the State is instead suggesting that there can be no rational or constitutional system of capital punishment when a jury performs its constitutionally mandated *Apprendi* fact-finding function (*see id.*), the argument is equally misplaced. Of the thirty-eight States that currently have the death penalty, twenty-nine require the jury to find the "aggravating circumstances" that allow capital sentencing.[35] Among the nine remaining jurisdictions,

35. *See* Ark. Code Ann. §§ 5-4-602 – 5-4-605 (LEXIS through 2001 legislation); Cal. Penal Code §§ 190.1 – 190.4 (LEXIS through 2001 Legis. Sess.); Conn. Gen. Stat. § 53a-46a (LEXIS through 2000 Legis. Sess.); Ga. Code Ann. §§ 17-10-30 – 17-10-31 (LEXIS through 2001 Ext. Legis. Sess.); 720 Ill. Comp. Stat. 5/9-1 (LEXIS through Public Act 92-34); Kan. Stat. Ann. §§ 21-4624 – 21-4626 (LEXIS through 2000 Supp.); Ky. Rev. Stat. Ann. § 532.025 (LEXIS through 2001 Legis. Sess.); La. Code Crim. Proc. Ann. arts. 905, 905.1 – 905.8 (LEXIS through 2001 Supp.); Md. Ann. Code art. 27, § 413 (LEXIS through 2001 Legis. Sess.); Miss. Code Ann. § 99-19-101 (LEXIS through 2001 1st Ext. Legis. Sess.); Mo. Rev. Stat. §§ 565.030, 565.032 (LEXIS through 1st Ext. Legis. Sess. 91st Gen. Assemb.); Nev. Rev. Stat. Ann. §§ 175.552, 175.554, 175.556, 175.558, 200.030, 200.033, 200.035 (LEXIS through 71st Reg. and 17th Spec. Legis. Sess. 2001) (*but see id.* § 175.556 (authorizing finding of aggravators by three-judge panel when jury is unable reach unanimous verdict)); N.H. Rev. Stat. Ann. § 630:5 (LEXIS through Ch. 297 2001 Sess. Gen. Ct.); N.J. Stat. Ann. § 2C:11-3 (LEXIS through N.J. 209th Legis., 2nd Ann. Legis. Sess. 2001); N.M. Stat. Ann. §§ 31-18-14, 31-20A-1, 31-20A-2, 31-20A-3 – 31-20A-6 (LEXIS through the 2nd Spec. Legis. Sess. 45th Legis.); N.Y. Penal
(Cont'd)

only five fail to provide at least a recommendation or preliminary fact-finding role for the jury in capital sentencing.[36] Thus, any suggestion that only a system such as Arizona's (in which the jury is involved neither in fact-finding nor in sentencing) passes constitutional muster is an

(Cont'd)
Law § 125.27 (LEXIS through Ch. 560, Dec. 12, 2001); N.Y. Crim. Proc. Law § 400.27 (LEXIS through Ch. 560, Dec. 12, 2001); N.C. Gen. Stat. § 15A-2000 (LEXIS through 2000 Legis. Sess.); Ohio Rev. Code Ann. §§ 2929.03 – 2929.05, 2929.022 (LEXIS through Oct. 24, 2001); Okla. Stat. tit. 21, §§ 701.9 – 701.13 (LEXIS through 2001 Supp.); Or. Rev. Stat. §§ 163.095, 163.150 (LEXIS through Aug. 1, 2000); 42 Pa. Cons. Stat. § 9711 (LEXIS through 2001 Pa. Act 77 June 26, 2001); S.C. Code Ann. §§ 16-3-20, 16-3-25 (LEXIS through 2000 Legis. Sess.); S.D. Codified Laws §§ 23A-27A-1 – 23A-27A-6 (LEXIS through 2001 Spec. Legis. Sess.); Tenn. Code Ann. §§ 39-13-202 – 39-13-204 (LEXIS through 2001 Legis. Sess. 102nd Gen. Assemb.); Tex. Penal Code Ann. § 19.03 (LEXIS through 1999 Legis. Sess.); Tex. Crim. Proc. Code Ann. art. 37.071 (LEXIS through 2001 Legis. Sess.); Utah Code Ann. §§ 76-3-206 – 76-3-207 (LEXIS through 2001 2nd Spec. Legis. Sess.); Va. Code Ann. §§ 19.2-264.2 – 19.2-264.4 (LEXIS through 2001 legislation); Wash. Rev. Code §§ 10.95.020 – 10.95.080 (LEXIS through 2001 3rd Spec. Legis. Sess.); Wyo. Stat. Ann. §§ 6-2-101 – 6-2-102 (LEXIS through 2001 Legis. Sess.).

36. *See* Ariz. Rev. Stat. Ann. § 13-703 (West & West Supp. 2001); Colo. Rev. Stat. § 16-11-103 (LEXIS through 2001 Legis. Sess.); Idaho Code § 19-2515 (LEXIS through 2nd Legis. Sess. 55th Legis.); Mont. Code Ann. §§ 46-18-301 – 46-18-306 (LEXIS through 2001 legislation); Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2523 (LEXIS through 2001 Legis. Sess.). The others allow the jury to render a non-binding "advisory recommendation" regarding the choice between the death penalty and a life sentence. *See* Ala. Code §§ 13A-5-43 – 13A-5-52 (LEXIS through 2001 Legis. Sess.); Del. Code Ann. tit. 11, § 4209 (LEXIS through 2001 Legis. Sess. 141st Gen. Assemb.); Fla. Stat. § 921.141 (LEXIS through 2001 Legis. Sess.); Ind. Code. Ann. § 35-50-2-9 (LEXIS through 2001 Legis. Sess.).

inherent attack on the capital sentencing systems in virtually every other jurisdiction in this Nation.[37] Nothing in this Court's decisions supports such an argument.

At bottom, the State's argument confuses policy with the requirements of the Constitution. The State is of course free to argue that capital sentencing by the court is preferable to such sentencing by a jury, and nothing in the Constitution prevents a State from enacting a system reflecting that policy decision. What the Sixth and Fourteenth Amendments do not allow, however, is the removal of constitutionally required fact-finding functions from a jury, even if a State believes that its system of criminal justice will be thereby made fairer or more efficient. The Framers made that choice in favor of jury trial, and Arizona is simply not free to abrogate that constitutional decision as a matter of its own public policy.

37. Capital punishment in the federal system is generally governed by the Federal Death Penalty Act of 1994, Pub. L. No. 103-322, tit. VI, 108 Stat. 1796, 1959-82, *codified as amended at* 18 U.S.C. §§ 3591-3598 (LEXIS through Pub. L. No. 107-136). The federal Act specifies aggravating and mitigating circumstances to be considered in determining whether the death penalty should be imposed following conviction for enumerated offenses. *See id.* §§ 3591-3592. Under the federal statute, the task of determining whether any aggravating factor exists must be given to a jury (either the trial jury or one convened for the purpose), unless the defendant requests otherwise and the government accedes to the request. *See id.* § 3593(b). The jury's finding with respect to any aggravating factor "must be unanimous," and "[i]f no aggravating factor . . . is found to exist, the court shall impose a sentence other than death authorized by law." *Id.* § 3593(d).

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed insofar as it affirms the death sentence imposed on petitioner.

Respectfully submitted,

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Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

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QUESTION PRESENTED FOR REVIEW

In *Walton v. Arizona*, 497 U.S. 639 (1990), this Court ruled that the Sixth Amendment does not require a jury determination of aggravating and mitigating circumstances under Arizona's capital sentencing procedures. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held, in a non-capital case, that facts increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. Should *Apprendi* be interpreted to overrule *Walton* and this Court's long line of capital cases holding that Eighth Amendment sentencing determinations, which narrow the category of defendants eligible for the death penalty, can be made by either a judge or a jury?

TABLE OF CONTENTS - Continued

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. *APPRENDI* DOES NOT COMPEL OVERRULING *WALTON*'S HOLDING THAT THE SIXTH AMENDMENT DOES NOT REQUIRE A JURY DETERMINATION OF AGGRAVATING FACTORS UNDER ARIZONA'S CAPITAL SENTENCING PROCEDURES	6
A. *Apprendi* Can Be Harmonized with *Walton* Because in Arizona a Death Sentence Is Within the Range of Sentences Available For a Charged Offense of First-Degree Murder, and the Due Process and Notice Concerns Underlying *Apprendi* Are Not Implicated by Arizona's Capital Sentencing Procedures	7
1. Death is Within the Statutory Range of Sentences Available for First-Degree Murder	9
2. Ring Had Actual Notice That He Faced A Possible Death Sentence.	19
3. Ring's Analysis Misconstrues *Apprendi* And Its Underpinnings	20

TABLE OF CONTENTS - Continued

	Page
B. History Demonstrates That Judicial Fact Finding Under Arizona's Capital Sentencing Statute Is Consistent With The Jury Trial Guarantee Of The Sixth Amendment.	26
C. *Walton* Is Consistent With A Long Line Of Cases Holding That Either A Judge Or A Jury Can Make Eighth Amendment Capital Sentencing Findings Without Implicating The Sixth Amendment	31
II. RING'S SENTENCE SHOULD NOT BE VACATED EVEN IF *WALTON* IS OVERRULED BECAUSE THE EXISTENCE OF THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE SUPPORTING THE SENTENCE IS NECESSARILY IMPLIED IN THE JURY'S GUILTY VERDICTS OF FELONY MURDER AND ARMED ROBBERY.	33
III. A DECISION TO OVERRULE *WALTON* SHOULD NOT BE RETROACTIVE	36
CONCLUSION	40

TABLE OF AUTHORITIES

Page

CASES

Allen v. Hardy, 478 U.S. 255 (1986) 37
Apprendi v. New Jersey, 530 U.S. 466 (2000).....*passim*
Arizona v. Rumsey, 467 U.S. 203 (1984).....10
Barrs v. Wilkinson, 924 P.2d 1033 (Ariz. 1996) 20
Butler v. McKellar, 494 U.S. 407 (1990).....38
Cabana v. Bullock, 474 U.S. 376 (1986) .....*passim*
Capano v. State, 781 A.2d 556 (Del. 2001) 16, 17
Clemons v. Mississippi, 494 U.S. 738 (1990).....*passim*
Daniels v. United States, 254 F.3d 1180 (10th Cir. 2001).....37
DeStefano v. Woods, 392 U.S. 631 (1968) 38
Dickerson v. United States, 530 U.S. 428 (2000).....33
Duncan v. Louisiana, 391 U.S. 145 (1968).....38
Eddings v. Oklahoma, 455 U.S. 104 (1982).....29
Enmund v. Florida, 458 U.S. 782 (1982).....*passim*
Forbes v. United States, 262 F.3d 143 (2d Cir. 2001).....39
Furman v. Georgia, 408 U.S. 238 (1972) .....*passim*
Gideon v. Wainwright, 372 U.S. 335 (1963).....38
Graham v. Collins, 506 U.S. 461 (1993).....38
Griffith v. Kentucky, 479 U.S. 314 (1987).....36
Harmelin v. Michigan, 501 U.S. 957 (1991)..... 8
Hildwin v. Florida, 490 U.S. 638 (1989) 31

TABLE OF AUTHORITIES - Continued

Page

Johnson v. Louisiana, 406 U.S. 366 (1972) 27
Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000).....37, 39
Jones v. United States, 526 U.S. 227 (1999).....10, 28
Keels v. United States, 785 A.2d 672 (D.C. App. 2001).....35
Lankford v. Idaho, 500 U.S. 110 (1991).....20
Lambrix v. Singletary, 520 U.S. 518 (1997) 32
McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001).....37
McMillan v. Pennsylvania, 477 U.S. 79 (1986).....22, 23, 24, 25
Mullaney v. Wilbur, 421 U.S. 684 (1975).....21, 22
Neder v. United States, 527 U.S. 1 (1999) 28
Patterson v. New York, 432 U.S. 197 (1977) 28, 29
People v. Helton, 749 N.E.2d 1007 (Ill. App. 2001).....39
People v. Rush, 757 N.E.2d 88 (Ill. App. 2001).....39
Poland v. Arizona, 476 U.S. 147 (1987).....12, 22, 31
Pope v. Illinois, 481 U.S. 497 (1986).....3 11
Proffitt v. Florida, 428 U.S. 242 (1976) .....*passim*
Pulley v. Harris, 465 U.S. 37 (1984) 18
Roberts v. Louisiana, 428 U.S. 325 (1976).....28, 30
Sawyer v. Smith, 497 U.S. 227 (1990) 38, 39
Schad v. Arizona, 501 U.S. 624 (1991) 29, 30
Solem v. Stumes, 465 U.S. 638 (1984) 37
Spaziano v. Florida, 468 U.S. 447 (1984)..... 11, 14, 26, 31

TABLE OF AUTHORITIES - Continued

Page

State v. Blazak, 560 P.2d 54 (Ariz. 1977).....15
State v. Djerf, 959 P.2d 1274 (Ariz. 1998).....38
State v. Gretzler, 659 P.2d 1 (Ariz. 1983).....21, 23
State v. Ring, 25 P.3d 1139 (Ariz. 2001) .....*passim*
State v. Sansing, 26 P.3d 1118 (Ariz. 2001).....36
State v. Wagner, 982 P.2d 270 (Ariz. 1999).....15
Teague v. Lane, 489 U.S. 288 (1989).....6, 37, 38, 39
Tison v. Arizona, 481 U.S. 137 (1987).....3, 17, 30, 32
Tyler v. Cain, 533 U.S. 656 (2001).....38
United States v. Moss, 252 F.3d 993 (8th Cir. 2001)....37, 39
United States v. Pressler, 256 F.3d 144 (3rd Cir. 2001).....35
United States v. Sanders, 247 F.3d 139 (4th Cir. 2001).....37, 39
United States v. Stewart, 256 F.3d 231 (4th Cir. 2001).....36
Walton v. Arizona, 497 U.S. 639 (1990).....*passim*
Whisler v. State, 36 P.3d 290 (Kan. 2001).....39
Winship, In re, 397 U.S. 358 (1970).....21, 23, 24
Williams v. New York, 337 U.S. 241 (1949) 29
Winston v. United States, 172 U.S. 303 (1899).....30
Wisconsin v. Mitchell, 508 U.S. 476 (1993).....18
Woodson v. North Carolina, 428 U.S. 280 (1976).....27, 29

TABLE OF AUTHORITIES - Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....18
U.S. Const. amend. V.....12
U.S. Const. amend. VI .....*passim*
U.S. Const. amend. VIII .....*passim*
U.S. Const. amend. XIV.....20, 39

STATUTES

28 U.S.C. § 2255.....37
Ariz. Rev. Stat. § 13–453 (1956).....22
Ariz. Rev. Stat. § 13–703.....19, 22, 24, 38
Ariz. Rev. Stat. § 13-703(A).....9, 15
Ariz. Rev. Stat. § 13–703(F).....*passim*
Ariz. Rev. Stat. § 13–703(F)(5).....34
Ariz. Rev. Stat. § 13–703(G)(5) 34
Ariz. Rev. Stat. § 13–1105 .....4, 9, 19
Ariz. Rev. Stat. § 13–1105(A) (2000).....22
Ariz. Rev. Stat. § 13–1105(A)(2).....33
Ariz. Rev. Stat. § 13-1105(C).....9, 19
Ariz. Rev. Stat. § 13–1902.....34, 35
Ariz. Rev. Stat. § 13–1904.....34
Ariz. Rev. Stat. § 43–2903 (1938).....22
1973 Ariz. Sess. Laws ch. 138, § 5 22
Ariz. Terr. Pen. Code § 173 (1901) 22

TABLE OF AUTHORITIES - Continued

Page

Ariz. Terr. Pen. Code § 174 (1901) 22
Ariz. Pen. Code § 173 (1913) 22
Fla. Stat. § 775.082(1) (1972) 29
Fla. Stat. § 782.04 (1941) 29
Del. Rev. Code ch. 155, § 35 (1935) 29

RULES

Rule 15.1(g)(1), Ariz. R. Crim. P. 20
Rule 18.4(b), Ariz. R. Crim. P. 20

STATEMENT OF THE CASE

This case raises the question whether this Court should reverse its decision in *Walton v. Arizona*, 497 U.S. 639 (1990), that the Sixth Amendment does not require a jury determination of aggravating circumstances necessary to impose a capital sentence. Even though *Walton* has never been repudiated or criticized as creating an unfair or unreliable capital sentencing process, Petitioner Timothy Ring has asked this Court to reverse *Walton* and order the Arizona state courts to resentence him.

Ring and his accomplices, James Greenham and William Ferguson, murdered Wells Fargo Armored Services driver John Magoch on November 28, 1994. On that day, Magoch and his partner, Dave Moss, stopped their armored truck outside a department store in Glendale, Arizona, and Moss went into the store. When he returned, the truck was gone. *State v. Ring*, 25 P.3d 1139, 1142 (Ariz. 2001).

Several hours later, police located the Wells Fargo truck in a parking lot and found Magoch's body on the passenger compartment floor. Magoch had been fatally shot in the head. *Id.* Approximately $563,000 in cash and $300,000 in checks had been removed from the truck. *Id.*

The criminal investigation began to focus on Ring and his accomplices after Greenham's ex-girlfriend spoke with police officers in January 1995. Law enforcement officers obtained a wiretap and recorded incriminating conversations between Ring and his accomplices. *Id.* at 1143-44. Officers searched Ring's

home and found evidence tying him to the crime, including approximately $272,000 in cash. *Id.* at 1144. Officers also learned that Ring, Greenham, and Ferguson had been spending thousands of dollars in cash. *Id.* at 1143-44. Following a jury trial, Ring was convicted of first-degree murder, conspiracy to commit armed robbery, armed robbery, first-degree burglary, and theft. *Id.* at 1142, 1144.

At Ring's sentencing hearing, Greenham provided additional details of the crime. Greenham testified that he, Ring, and Ferguson planned and carried out the robbery. *Id.* at 1144. Ring was the leader of the group, and Ring shot Magoch with a rifle. *Id.*

The trial court sentenced Ring to death on the first-degree murder conviction after finding two aggravating circumstances: (1) pecuniary gain, and (2) the offense was committed in an especially heinous or depraved manner. *Id.* The trial court found, as a non-statutory mitigating circumstance, Ring's "minimal criminal record," but concluded that it was not sufficiently substantial to call for leniency. *Id.* at 1145. The trial court imposed prison sentences for Ring's other felony convictions. *Id.* at 1142.

Ring appealed to the Arizona Supreme Court, arguing, among other things, that Arizona's capital sentencing statute is unconstitutional because it violated his Sixth Amendment right to have a jury make factual findings regarding aggravating and mitigating factors. The Arizona Supreme Court affirmed Ring's convictions and sentences, specifically rejecting Ring's Sixth Amendment argument. *Id.* at 1154, 1156. The Arizona

Supreme Court struck the heinous/depraved aggravating factor, but affirmed the death sentence after independently reweighing the remaining aggravating circumstance of pecuniary gain against the minimal mitigation. *Id.* at 1156.

This Court granted Ring's petition for certiorari review of the Arizona Supreme Court's decision regarding his Sixth Amendment claim.

SUMMARY OF ARGUMENT

I. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not compel overruling the holding in *Walton v. Arizona*, 497 U.S. 639 (1990), that Eighth Amendment determinations that narrow the category of defendants who may be sentenced to death do not implicate the Sixth Amendment.

A. *Walton* is one in a long line of opinions holding that either a judge or a jury can make determinations regarding Eighth Amendment limitations on capital punishment. This Court has repeatedly held that the Sixth Amendment does not require a jury to make Eighth Amendment determinations, such as *Enmund/Tison*[1] findings, *see Cabana v. Bullock*, 474 U.S. 376 (1986), *overruled in part on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987); the existence of aggravating and mitigating factors, *see Walton;* and the weighing or reweighing (by an appellate court) of aggravating and

[1] *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

mitigating factors, *see Clemons v. Mississippi*, 494 U.S. 738 (1990).

Apprendi can be harmonized with *Walton*. *Apprendi* holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Findings regarding aggravation and mitigation under Arizona's capital sentencing scheme do not increase the penalty for first-degree murder beyond the prescribed statutory maximum. Arizona's first-degree murder statute provides that the range of punishment for that crime is either life imprisonment or death. ARIZ. REV. STAT. (A.R.S.) § 13-1105. Thus, the prescribed statutory maximum for the crime Ring committed is death. *Apprendi* is distinguishable on that basis alone.

Other concerns underlying the *Apprendi* decision are similarly absent in the instant case. For example, the defendant in *Apprendi* was only on notice that he was being charged with a second-degree offense, which would subject him to a specific range of punishment. He was punished, however, with a sentence beyond the range for a second-degree offense based on a fact (the crime was motivated by racial bias) not alleged in the charging instrument. Thus, the defendant was effectively punished for a first-degree offense even though he was only on notice that he was being charged with a second-degree offense.

In contrast, the State charged Ring with, and convicted him of, a class one felony. He was on notice from the date of indictment that he faced a possible death sentence if convicted of the charged offense. The due

process and notice concerns underlying the *Apprendi* decision are simply not present in the instant case.

B. Historical sentencing practices afford no basis for finding that Arizona's capital sentencing procedures violate the Sixth Amendment. Arizona's death penalty statute does not reduce the scope of the jury's traditional role of determining guilt or innocence. Arizona juries continue to make all decisions regarding the elements of the crime of first-degree murder, and the concern raised in *Apprendi* regarding an "unacceptable departure from the jury tradition," 530 U.S. at 497, is not present in this case.

The Arizona Legislature enacted Arizona's capital sentencing statute to satisfy the Eighth Amendment requirement imposed in *Furman v. Georgia*, 408 U.S. 238 (1972), that the sentencer's discretion in a capital case be adequately channeled. The Eighth Amendment *narrowing* function prescribed by *Furman* is unrelated to the historical role of the jury in determining guilt or innocence. Overruling *Walton* based on *Apprendi*'s mechanistic approach would create a new, unjustified Sixth Amendment right that the Framers never intended.

C. Notwithstanding more than ten years of post-*Walton* capital litigation in Arizona and other states with similar sentencing schemes, the rationale underlying *Walton* and the other cases cited above has never been repudiated. Absent some indication that *Walton* and those cases result in unfair or unreliable capital sentencing, this Court should not reverse its express holding that a determination of aggravating and mitigating factors can be made by either a judge or a jury without violating the Sixth Amendment.

II. Any error in having a judge, rather than a jury, determine aggravating circumstances is harmless in this case. The jury's verdicts of guilt of felony murder and armed robbery necessarily imply the existence of the pecuniary gain aggravating factor underlying Ring's sentence. Accordingly, Ring's sentence should not be set aside.

III. If this Court decides to overrule *Walton*, the holding should not be applied retroactively. In *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion), this Court noted that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment." Accordingly, overruling *Walton* was not foreseeable, and a change from having a judge determine aggravating and mitigating factors would not be a "watershed" rule of criminal procedure that implicates the fundamental fairness and accuracy of a criminal proceeding. *See Teague v. Lane*, 489 U.S. 288, 295 (1989).

ARGUMENT

I. *APPRENDI* DOES NOT COMPEL OVERRULING *WALTON*'S HOLDING THAT THE SIXTH AMENDMENT DOES NOT REQUIRE A JURY DETERMINATION OF AGGRAVATING FACTORS UNDER ARIZONA'S CAPITAL SENTENCING PROCEDURES.

Walton v. Arizona, 497 U.S. 639 (1990), was a well-reasoned extension of existing case law and is consistent with this Court's rulings in cases addressing related issues. *Walton* has never been criticized as creating an

unfair or unwise rule in capital cases, and Arizona and other states have long relied on it in conducting capital sentencing proceedings.

The holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that facts that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, can be harmonized with *Walton*. Findings regarding aggravating factors under Arizona's capital sentencing statute are necessary under the Eighth Amendment; they do not, however, increase the range of punishment for a charged offense of first-degree murder in Arizona. Accordingly, the Sixth Amendment due process and notice concerns underlying the *Apprendi* decision are not present in the capital sentencing context.

A. *Apprendi* Can Be Harmonized with *Walton* Because in Arizona a Death Sentence is Within the Range of Sentences Available for a Charged Offense Of First-Degree Murder, and the Due Process and Notice Concerns Underlying *Apprendi* Are Not Implicated by Arizona's Capital Sentencing Procedures.

In *Apprendi*, the defendant pled guilty to possession of a firearm for an unlawful purpose, a crime designated in New Jersey's substantive criminal statute as a second-degree offense, punishable under New Jersey's felony sentencing statute by a five- to ten-year prison term. 530 U.S. at 468-70. The charging instrument made no reference to a third New Jersey statute aimed at hate crimes, which enhanced the sentencing range from the second-degree to first-degree level (ten to twenty years) upon a finding by the sentencing court by

a preponderance of the evidence that the defendant committed the crime with a racially biased purpose. *Id.* at 469. The New Jersey trial court made such a finding and imposed a twelve-year sentence, which two state appellate courts later affirmed. *Id.* at 471.

This Court held that application of New Jersey's hate crime statute, which the indictment did not mention, resulted in the judge making the type of finding traditionally reserved for the jury. This Court found that Apprendi had a Sixth Amendment right to a jury finding of racial bias because it increased the penalty for the crime beyond the prescribed statutory maximum for the charged offense. *Id.* at 475-76, 494 n.19. This Court thus ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

The due process and notice concerns underlying the *Apprendi* analysis do not apply to Arizona's capital sentencing procedures, because the existence of an aggravating factor does not increase the *range* of sentence for a charged offense of first-degree murder. Furthermore, *Apprendi*'s mechanistic test based on whether a factual determination "increases the penalty for a crime beyond the prescribed statutory maximum" is not easily applied to capital cases because, as this Court has long-recognized, "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (quoting *Furman*, 408 U.S. at 306 (Stewart, J., concurring)). *Apprendi*'s mathematical precision fails to account for the unique Eighth Amendment requirements

imposed only in capital cases. *See Walton*, 497 U.S. 639, 671 (Scalia, J., concurring). Accordingly, *Apprendi* does not compel the conclusion that a judge determination of aggravating factors in a capital sentencing proceeding violates the Sixth Amendment.

1. Death Is Within the Statutory Range of Sentences Available for First-Degree Murder.

The indictment in this case (J.A. at 8a-9a) charged Ring with committing first-degree murder under A.R.S. § 13-1105(C), which provides:

> First degree murder is a Class 1 felony and is punishable by *death or life imprisonment* as provided by section 13-703.

(Emphasis added.) A.R.S. § 13-703(A) is equally unambiguous:

> A person guilty of first degree murder as defined in section 13-1105 shall suffer *death or imprisonment* in the custody of the state department of corrections for life as determined and in accordance with the procedures provided in subsections B through G of this section.

(Emphasis added.)

Given the clear language of A.R.S. §§ 13-1105 and 13-703, death is within the range of punishment available for someone convicted of first-degree murder. Consequently, a defendant charged with first degree murder in Arizona "is *charged with* actions that expose him to the death penalty," and his right to a jury trial extends to "all the elements of the *charge*." *Apprendi*, 530 U.S. at

497 (citation and internal quotation omitted) (emphasis added).

The Arizona statute upheld in *Walton* remains materially unchanged. So too does this Court's determination of what a "range of sentencing" means for Sixth Amendment purposes:

> [T]he finding of aggravating facts falling within the traditional scope of capital sentencing [is] a choice between a greater and a lesser penalty, not . . . a process of raising the ceiling of the sentencing range available.

Jones v. United States, 526 U.S. 227, 251 (1999) (characterizing the holding in *Walton*); *accord Arizona v. Rumsey*, 467 U.S. 203, 209-10 (1984) ("The sentencer – the trial judge in Arizona – is required to choose between two options: death, and life imprisonment without possibility of parole for 25 years.").

In *Walton*, this Court rejected the argument that aggravating circumstances are elements of the crime that must be found by the jury. 497 U.S. at 648-49. Finding that aggravating circumstances are simply "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment," this Court upheld Arizona's capital sentencing procedures, which authorize a judge, rather than a jury, to determine the existence of aggravating and mitigating circumstances, and to decide whether to impose the death penalty. *Id.*

Walton was not an aberration. In *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion), this Court held that jury sentencing was not "constitutionally required" under the Eighth Amendment. This Court

noted that judicial sentencing appeared to further the goals of the Eighth Amendment by ensuring "even greater consistency in the imposition at the trial court level . . . [of] sentences similar to those imposed in analogous cases." *Id.*

Proffitt was applied in *Spaziano v. Florida*, 468 U.S 447 (1984), in which this Court specifically rejected a claim that the Sixth Amendment right to a jury trial applies to the sentencing process. Even though Florida's death penalty sentencing scheme provided for an advisory recommendation by the jury, *Spaziano* held that the state could conduct a resentencing hearing without such an advisory recommendation. 468 U.S. at 453.

Subsequently, in *Cabana v. Bullock*, 474 U.S. 376 (1986), *overruled in part on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987), this Court held that the Sixth Amendment does not require a jury determination of eligibility for the death penalty in a felony murder case under *Enmund v. Florida*, 458 U.S. 782 (1982):

> [O]ur ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury. Rather, as the Fifth Circuit itself has recognized, *Enmund* "does not affect the state's definition of any substantive offense, even a capital offense." . . .
>
> . . .
>
> . . . *Enmund* . . . imposes a categorical rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death. Nonetheless, the rule remains a substantive limitation on sentencing, and like

> other such limits it need not be enforced by the jury.

Cabana, 474 U.S. at 385-86 (citations omitted).

In *Poland v. Arizona*, 476 U.S. 147 (1987), this Court addressed a related issue and concluded that an appellate court's rejection of the sole aggravating circumstance underlying the defendants' death sentence did not "acquit" the defendants of the death penalty. This Court held that because aggravating circumstances are not elements of the crime under Arizona's death penalty statute the Double Jeopardy bar of the Fifth Amendment did not preclude the imposition of the death penalty (based on the aggravating circumstance of pecuniary gain) in the defendants' second trial even though they had been "acquitted" of the only aggravating circumstance (cruelty) found to exist during their first trial. *Id.* at 150, 156-57.

Walton was a natural extension of those cases:

> Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in Arizona they are "elements of the offense." But as we observed in *Poland v. Arizona*, an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not

> 'acquit' a defendant (*i.e.*, preclude the death penalty)."

Our holding in *Cabana v. Bullock*, provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund v. Florida* finding – that the defendant killed, attempted to kill, or intended to kill – in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense,'" and that "while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.

> We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

497 U.S. at 648-49 (citations omitted).

In a case decided contemporaneously with *Walton*, this Court held in *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990), that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by

harmless-error review." This Court affirmed that appellate court determinations of sentencing findings do not compromise the Sixth Amendment.

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Clemons, 494 U.S. at 745-46 (citing *Cabana*, *Enmund* and *Spaziano*, among other cases).

These cases show that the clear language of the Arizona statute is properly interpreted to include death within the range of punishment for someone convicted of first-degree murder. *Apprendi* does not require a different conclusion.

The Arizona Supreme Court's statement in the *Ring* opinion that "a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings," 25 P.3d at 1151, does not alter the analysis. That same court has previously made clear that death is within the range of punishment for first-degree murder. In rejecting a vagueness challenge to

Arizona's capital sentencing statute, the Arizona court stated:

> Arizona's statute . . . [A.R.S. § 13-703(A)] states with clarity that *the punishment for committing first degree murder is either death, natural life, or life in prison with the possibility of parole.* Thus, a person of ordinary intelligence can easily determine the *range of punishment* he or she faces for committing first degree murder.

State v. Wagner, 982 P.2d 270, 273 (Ariz. 1999) (emphasis added); *see also State v. Blazak*, 560 P.2d 54, 61 (Ariz. 1977) (rejecting argument that Arizona's present sentencing system creates an aggravated or capital murder class of homicide; procedure merely sets forth guidelines for determination of punishment after a defendant is convicted of first-degree murder).

In light of *Wagner* and *Blazak*, the Arizona Supreme Court's statement in *Ring* could be just as accurately restated as follows:

> A defendant cannot receive the maximum penalty authorized under the range of sentences allowable for a first-degree murder conviction in Arizona solely on the basis of the jury's verdict.

The fact that the Arizona Supreme Court's statement can be reworded – without changing its import – in such a way to satisfy both *Apprendi* and *Walton* demonstrates that the statement, by itself, is not controlling regarding the issue before this Court.

The *Ring* concurring opinion reflects this analysis:

> In this case, Ring's punishment was not above the statutory range allowed by the jury's guilty verdict. Death is plainly within the statutory range of a guilty verdict for first degree murder. A.R.S. § 13-1105(C). Such a verdict is essential to a finding that a defendant is death eligible. Only first degree murder is a capital offense. One cannot be sentenced to death without such a verdict. The jury must find all the elements of the charge under *Apprendi* and the Sixth Amendment. The factual findings in aggravation and mitigation made by the trial court are not elements of the charge triable by jury under the Sixth Amendment, but rather, capital sentencing limitations driven by the *Eighth* Amendment. *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 3054-55, 111 L. Ed. 2d 511 (1990).

Ring, 25 P.3d at 1157 (Martone, J., concurring) (emphasis in original).

The Delaware Supreme Court's discussion of that state's capital sentencing procedures in *Capano v. State*, 781 A.2d 556 (Del. 2001), is similarly instructive. The Delaware court found that the jury's guilty verdict "authorized" the death sentence, even though the penalty phase of the trial had yet to be conducted:

> Under Delaware's death penalty procedure, when a jury finds a defendant guilty of first degree murder, the jury *authorizes* the statutory maximum penalty: the death sentence, subject to the penalty phase and the judge's decision on sentencing. Once the jury during the guilt phase of the trial authorizes the maximum penalty, "it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . ." We therefore conclude that the holding in *Apprendi* does not implicitly or explicitly affect the Supreme Court's previous decisions permitting judges to find statutory aggravating factors without a jury verdict on the underlying factual questions.

781 A.2d at 672-73 (citation omitted) (emphasis in original).

Ring simply reads too much into the phrase "a defendant cannot be put to death solely on the basis of a jury's verdict." The exact same statement could be applied to an *Enmund/Tison* finding. The Arizona Supreme Court's opinion does not suggest that the *Enmund/Tison* finding in the instant case hangs in the balance. Nor does Ring. Ring has not even cited to *Cabana* or otherwise discussed its holding that such a finding can be made by a judge.

Justice O'Connor's discussion of Arizona law in her *Apprendi* dissent similarly does not compel the conclusion that the existence of aggravating circumstances creates a new sentencing range. Justice O'Connor's states, "If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment." 530 U.S. at 537 (O'Connor, J., dissenting). As with the Arizona Supreme Court's statement, Justice O'Connor's depiction of Arizona law is accurate, but not dispositive of the issue before the Court.

The same type of statement by Justice O'Connor in *Apprendi* and by the Arizona Supreme Court in *Ring* could be made regarding other factors that do not bear

on the Sixth Amendment. For example, if a state mandates a proportionality review in capital cases (something that is not constitutionally required, *see Pulley v. Harris*, 465 U.S. 37, 44 & n.6 (1984)), it would be technically accurate to state, "A defendant cannot be put to death solely on the basis of a jury's verdict. Death can only be imposed if the defendant's sentence is proportionate to that imposed in other cases involving similarly situated defendants." Such a statement would not, however, create a Sixth Amendment right to a jury determination of the proportionality of the defendant's sentence. *See Cabana*, 474 U.S. at 385 (describing the *Enmund* finding as a type of proportionality inquiry).

Finally, to the extent the Arizona Supreme Court's statement can be interpreted as a conclusion that Arizona's capital sentencing scheme falls within the *Apprendi* analysis, that conclusion is not controlling. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), this Court considered a claim that Wisconsin's sentencing enhancement for discriminatory intent violated the First Amendment. Although the Wisconsin Supreme Court had determined that the enhancement statute violated the First Amendment "by punishing what the legislature has deemed to be offensive thought," rather than conduct, this Court rejected that analysis:

> There is no doubt that we are bound by a state court's construction of a state statute. . . . But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. . . . This assessment does not bind us. Once any

> ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

508 U.S. at 483-84.

There are no ambiguities regarding the sentencing range contemplated in Arizona's capital sentencing statutes. Under A.R.S. §§ 13-1105 and 13-703, death is within the range of sentences available for a defendant convicted of first-degree murder. *Apprendi* is distinguishable on that basis.

2. Ring Had Actual Notice that He Faced a Possible Death Sentence.

The charging instrument in *Apprendi* afforded no notice that the defendant's sentence could be increased beyond the ten-year statutory maximum sentence for a second-degree offense. The indictment referred only to a statute defining the second-degree offense; it did not reference an additional hate crime statute that enhanced the sentencing range based on the additional finding of racial bias.

In contrast, the indictment in this case charged Ring with first-degree murder under A.R.S. § 13-1105(C), which states that "[f]irst degree murder is a Class 1 felony *and is punishable by death or life imprisonment* as provided by section 13-703." (Emphasis added.) Moreover, unlike the charging instrument in *Apprendi*, the indictment in this case referred specifically to the separate sentencing statute, in this case the capital sentencing provision that enumerates aggravating factors.

Contrary to Ring's assertion, Arizona's capital sentencing scheme has not "done much the same" as New Jersey's hate crime enhancement scheme, simply because both schemes involve more than one statute. (Brief for Petitioner at 19.) The deficiency in the New Jersey scheme was that the defendant had no means of discerning that he was subject to a sentence enhancement or the grounds upon which the enhancement could rest. That deficiency is not present here.

Moreover, the State did not rest on formal statutory notice. As required by Rule 15.1(g)(1) of the Arizona Rules of Criminal Procedure, the State filed a notice of intent to seek the death penalty within thirty days of indictment. "Rule 15.1(g) was adopted primarily because due process requires adequate notice to capital defendants that they might be sentenced to death." *Barrs v. Wilkinson*, 924 P.2d 1033, 1035 (Ariz. 1996) (citing *Lankford v. Idaho*, 500 U.S. 110 (1991)). When death is a possible punishment, other procedures are also brought to bear. *See, e.g.*, Ariz. R. Crim. P. 18.4(b) cmt. at (14) ("death-qualification" of jury panel). Ring had more than statutory notice; he had actual notice that he might receive a death sentence. He has no plausible argument that he was unaware he faced a possible death sentence if convicted of the charged offense.

3. Ring's Analysis Misconstrues *Apprendi* and Its Underpinnings.

Apprendi revisited the same issue presented in several other noncapital criminal cases: whether a particular statute relieved the state of its traditional obligation under the Sixth and Fourteenth Amendments to prove each element of a crime to a jury, beyond a reasonable

doubt, by recasting elements as "sentencing factors." However, the determination of aggravating factors underlying a death sentence has never been part of the jury's traditional role.

Ring's analysis fails because he cannot establish that the aggravating factors in the Arizona statute are in reality elements of a more severely punishable uncharged crime. As Ring repeatedly states, it is not the statutory label of a finding, but rather its effect, that controls whether it is an element or a sentencing factor. *Apprendi* relied on several Sixth Amendment cases in an effort to discern the functional distinction between an element and a sentencing factor. In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court struck down a Maine statute because it effectively enabled prosecutors in first-degree murder cases to avoid the Sixth and Fourteenth Amendment strictures of *In re Winship*, 397 U.S. 358 (1970), by creating a presumption of murderous intent that a defendant had to affirmatively rebut. *Apprendi* characterized *Mullaney* as "dismiss[ing] the possibility that a State could circumvent the protections of *Winship* merely by redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 530 U.S. at 485 (internal quotations omitted).

Arizona's capital sentencing statute does not redefine any of the historic elements of first-degree murder. The Arizona legislature enacted the first version of the current capital sentencing statute in 1973, in direct response to this Court's declaration in *Furman* that a death sentence imposed in the unguided discretion of a jury violated the Eighth Amendment. *State v. Gretzler*, 659 P.2d 1, 12-13 (Ariz. 1983). The statute repealed by

the 1973 legislation was the last in a line of first-degree murder statutes originating in Arizona's territorial days. Every successive version of the pre-*Furman* statutes placed unfettered discretion in the jury (or the court in bench trials) to sentence first-degree murderers to either death or life imprisonment. *See* Ariz. Terr. Pen. Code § 174 (1901); Ariz. Pen. Code § 173 (1913); A.R.S. § 43-2903 (1938); A.R.S. § 13-453 (1956). The capital sentencing statute enacted in 1973, now codified as A.R.S. § 13-703, shifted the sentencing decision to the trial court. 1973 Ariz. Sess. Laws ch. 138, § 5 (originally codified as A.R.S. § 13-454). It also strictly limited the sentencing court's discretion to impose the death penalty to cases in which the court found, beyond a reasonable doubt, the existence of at least one specifically enumerated aggravating circumstance. *Id.* The 1973 legislation did not amend Arizona's substantive first-degree murder statute, which remains today substantially identical to its nineteenth century territorial counterpart. *Compare* Ariz. Terr. Pen. Code, § 173 (1901), *with* A.R.S. § 13-1105(A) (2000).

The aggravating factors in A.R.S. § 13-703(F) have never been part of the definition of first-degree murder in Arizona. Thus, this Court properly determined in *Poland* that the aggravating circumstances specified in Arizona's capital sentencing scheme are not elements of the offense, 476 U.S. at 156-57, and the *Mullaney* concern addressed in *Apprendi* is not present here.

Apprendi also relied upon *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), which examined a Pennsylvania statute that imposed a mandatory minimum five-year sentence if the judge found, by a preponderance of the evidence, that the defendant "'visibly possessed a

firearm in the course of committing one of these specified felonies.'" *Apprendi*, 530 U.S. at 486 (quoting *McMillan*, 477 U.S. at 81-82). *Apprendi* characterized the inquiry in *McMillan* as whether the statute "r[a]n afoul of our previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures." *Id.*

Arizona's post-*Furman* capital sentencing statute does not violate either of these admonitions. The 1973 enactments left the same prima facie elements of first-degree murder exactly as they were. To this day, the State has the burden of proving the same prima facie elements of first-degree murder to a jury, beyond a reasonable doubt. Far from relieving the State of its evidentiary burden in the jury trial, the current capital sentencing statute imposes *additional* evidentiary burdens to be carried beyond a reasonable doubt in a hearing before the court, and as an absolute prerequisite to imposition of a death sentence.

The Arizona capital sentencing statute similarly does not breach the second *McMillan* admonition. The Arizona Legislature adopted the present aggravation/mitigation system from the Model Penal Code to correct the Eighth Amendment infirmity identified in *Furman*. *See Gretzler*, 659 P.2d at 12-13. Accordingly, the Arizona Legislature did not "tailor the form" of its capital sentencing statute to avoid the Sixth and Fourteenth Amendment strictures of *In re Winship*. A.R.S. § 13-703(F) is not "tailored to permit the . . . finding to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88.

Ring offers no analysis regarding whether Arizona's capital sentencing statute raises the *Winship* concerns identified in *McMillan*. He refers to *McMillan* only once, to restate this Court's conclusion that *McMillan* did not compel a different result in *Apprendi*. (Brief for Petitioner at 15.)

What Ring does offer is a reiteration of this Court's statement in *Apprendi* that the Sixth Amendment requires a jury to find any fact that would "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." 530 U.S. at 494. Indeed, he quotes the passage eight times, and paraphrases it as many more. (Brief for Petitioner at 3, 9-10, 13, 14, 15, 17, 19, 34.) But Ring abandons Sixth Amendment analysis at that point. He does not discuss the Arizona capital sentencing statute beyond repeating what Justice O'Connor stated in her *Apprendi* dissent and the Arizona Supreme Court observed in *State v. Ring*. As noted previously, those statements are not dispositive of the issue before this Court.

Ring's analysis regarding the effect of the State's motivations for enacting a post-*Furman* capital sentencing statute is flawed. The State has never contended that its Eighth Amendment motivations in enacting the statute insulate it from attack on Sixth Amendment grounds. (Brief for Petitioner at 31.) Rather, the Eighth Amendment *function* of the aggravating factors, and their limiting *effect*, establish that A.R.S. § 13-703 remains consistent with the Sixth Amendment. Justice Scalia noted in *Walton*, "when a State adopts capital punishment for a given crime, . . . the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients, but requires it to

establish, in advance, and convey to the sentencer, a governing standard." 497 U.S. at 671 (Scalia, J., concurring). The State's undisputed motivation – to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion – distinguishes this case from *McMillan* and illuminates the purpose and effect of aggravating factors in Arizona. Sixth Amendment jury trial requirements do not attach to determinations of aggravating factors merely because this Court requires states to codify such factors (or other comparable limiting criteria) to satisfy the Eighth Amendment.

Ring argues that if a State's motivations control the inquiry, then a defendant in one state would receive a jury trial to determine the same fact that a trial court would determine in another state. This, he believes, will "embroil this Court in difficult State-by-State analyses as to whether a particular change in a State's definition of capital homicide was prompted by a desire to adhere to the Eighth Amendment." (Brief for Petitioner at 31.)

Ring's argument fails, however, because anomalous treatment of sentencing considerations from state to state is perfectly acceptable. A state legislature has the prerogative to incorporate a fact into the substantive definition of "capital murder" and treat it as an element. When it does so, the jury trial guarantee obviously attaches to proof of the element. That does not mean that other states must follow suit. One state's elevation of a factor to the status of an element does not create a jury trial right to a determination of that element in other states. One state legislature cannot amend another state's statutes. It cannot create a Sixth Amendment

right in another state. Ring is using the Sixth Amendment to justify a lockstep capital sentencing approach that this Court has expressly disavowed. *See Spaziano*, 468 U.S. at 464 ("[W]e are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."). Even if a majority of states determine that capital sentencing should be performed by a jury, the Sixth Amendment does not require jury sentencing: "What we do not accept is that, because juries may sentence, they constitutionally must do so." *Id.* at 463 n.8. A legislature's decision to create additional elements of murder, which effectively serve the Eighth Amendment narrowing function (regardless of motivation) is a matter of largesse for Sixth Amendment purposes.

While Arizona's capital sentencing procedures offer criminal defendants some of the protection traditionally afforded elements of a crime (*i.e.*, proof beyond a reasonable doubt with evidence admissible in accordance with the rules of evidence), the procedures do not infringe on the traditional jury role of determining the elements of the crime. Overruling *Walton* based on *Apprendi* would mechanistically create an illusory Sixth Amendment right where none was intended or otherwise justified. Accordingly, *Apprendi* does not compel the conclusion that Arizona's statutory scheme violates the Sixth Amendment.

B. History Demonstrates That Judicial Fact Finding Under Arizona's Capital Sentencing Statute Is Consistent With The Jury Trial Guarantee Of The Sixth Amendment.

The Framers of the United States Constitution never contemplated a jury trial of every fact controlling

sentencing. The Sixth Amendment played no part in the evolution of capital sentencing schemes, and Ring's effort to attach a Sixth Amendment imperative to modern Eighth Amendment capital sentencing requirements, such as the determination of aggravating factors under A.R.S. § 13-703(F), is unsupportable. Although there may be tension between the language in *Apprendi* and the capital sentencing statute upheld in *Walton*, there is no tension between the Arizona statute and the Sixth Amendment.

Original intent controls the historical analysis. "The process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law." *Johnson v. Louisiana*, 406 U.S. 366, 370 at n.6 (1972) (Powell, J., concurring).

Ring begins with, then builds upon, a flawed characterization of the law as it existed in 1791. Ring declares it was "well understood . . . that a jury's guilty verdict with respect to the crime of capital homicide included within it all factual findings necessary to allow the imposition of a death sentence." (Brief for Petitioner at 25.) Ring neglects to mention that *all* capital homicide (murder) convictions resulted in a death sentence by operation of law. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion). Jurists in 1791 shared no "understanding" that a jury verdict had to incorporate findings "necessary to allow the imposition of a death sentence," because no other sentence was "allowed" in the first instance. Any understanding of the jury's role in murder trials beyond the bare determination of guilt or innocence could only have been an

understanding that the jury had to find something *more* than the prima facie elements of murder that automatically resulted in a death sentence. No such understanding could have existed given the fixed, automatic death penalty for murder.

Ring cannot alter the historical fact that juries had no role in fixing punishments in 1791. The Framers had no reason to consider whether the Sixth Amendment jury trial right applied to a fact that increased a murderer's sentence from life to death, because death was the only penalty for murder, without exception. *See Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (plurality opinion).

Under these circumstances, the Framers can only have considered the jury's singular function – returning a guilty or not guilty verdict – when they created an inviolate constitutional right to trial by an impartial jury of one's peers. "The right to be tried by a jury in criminal cases obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged." *Neder v. United States*, 527 U.S. 1, 31 (1999) (Scalia, J., *concurring in part and dissenting in part*). There is no historical "understanding" built into the Sixth Amendment that requires a jury to decide every fact requisite to the imposition of a death sentence.

Ring's discussion of criminal homicide under the common law is particularly misleading. He correctly notes that homicide developed into two crimes, murder and manslaughter, distinguishable by the element of malice aforethought, and that only the former was punishable by death. *See Jones*, 526 U.S. at 240; *Patterson v. New York*, 432 U.S. 197, 216-17 (1977). But

the critical conclusion Ring draws from those facts is illogical. The common law courts did not start with a noncapital crime and "increase . . . the quantum of facts necessary to establish capital murder." (Brief for Petitioner at 25.) To the contrary, the common law *exempted* from capital punishment a wide category of homicides that it previously punished by death regardless of circumstances such as malice aforethought or the commission of another felony. *See Eddings v. Oklahoma*, 455 U.S. 104, 110-11 (1982).

Ring also argues that "the right of the jury to make the factual determinations that would determine whether a defendant could be subjected to capital punishment" was "particularly well established" by 1791. (Brief for Petitioner at 25-26) (internal quotation omitted). Alternative sentences for murder did not appear, however, until the mid nineteenth century. Tennessee enacted the first discretionary death penalty statute in 1838, followed by Alabama in 1841, and Louisiana in 1846.[2] *Woodson*, 428 U.S. at 291. As Ring states, postconstitutional American legislatures gradually began replacing common law murder statutes with provisions defining murder by degrees. *Schad v. Arizona*, 501

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[2] This development stemmed from jury nullification and had nothing to do with Sixth Amendment jury trial guarantees. *See Woodson*, 428 U.S. at 296-300. Several jurisdictions retained their mandatory capital punishment statutes well into the twentieth century. *See, e.g.*, Fla. Stat. § 782.04 (1941). Moreover, some of the discretionary statutes, including Arizona's, vested sentencing discretion in the court in guilty plea cases. *See, e.g.*, Fla. Stat. § 775.082(1) (1972). Others placed the sentencing decision in the trial court's hands even when the case was tried to a jury. *E.g.*, Del. Rev. Code ch. 155, § 35 (1935); *Williams v. New York*, 337 U.S. 241, 244-45 (1949) (rejecting due process challenge to New York statute giving courts discretion to sentence first-degree murderers to death or life imprisonment).

U.S. 624, 640-41 (1991) (plurality opinion). The early first-degree murder statutes, like their contemporary counterparts, typically required proof of premeditation or death resulting from the commission of a felony, just as common law murder required proof of either premeditation (or other manifestations of "malice aforethought") or death resulting from the commission of a felony. *Id.* at 640-41 & n.8. Death was the exclusive, automatic penalty under both common law murder and the early first-degree murder statutes. *See Winston v. United States*, 172 U.S. 303, 310-11 (1899); *Tison*, 481 U.S. at 159 n.2 (Brennan, J., dissenting) (discussing common law murder).

Like the common law courts that separated murder from manslaughter, the American legislatures did *not* create a new category of homicides, punishable by a more severe sentence, upon proof of any fact that was not *already* an element of common law murder. *See Schad*, 501 U.S. at 640-41. The movement toward classification of murder by degrees "*narrow*[*ed*] the definition of capital homicide." *Roberts*, 428 U.S. at 332; *see also, Furman*, 408 U.S. at 297 (Brennan, J., concurring) ("the crime of capital murder has itself been *limited*" by statutes dividing murder into degrees) (emphasis added). Accordingly, Ring errs by stating that first-degree murder under the postcolonial statutes "required the proof of additional facts" in order to impose a death sentence. (Brief for Petitioner at 27.)

Ring's description of the post-*Furman* capital sentencing statutes suffers from the same defect. States did not "once again add[] to the quantum of facts needed to establish capital homicide" in the effort to satisfy Eighth Amendment requirements under *Furman*. (Brief for

Petitioner at 29.) Aggravating circumstances in Arizona's capital sentencing statute reduced the punishment for a vast number of first-degree murders that would otherwise have been punishable by death regardless of such circumstances under the pre-*Furman* predecessor statute. The new capital sentencing statute did not create a higher degree of murder requiring proof of "additional facts."

The State has never suggested that "the Sixth Amendment guarantee of jury trial no longer applies to all facts necessary for the imposition of a death sentence," as Ring contends. (Brief for Petitioner at 26.) As the historical record demonstrates, the Sixth Amendment never embodied such a right in the first instance.

C. *Walton* is Consistent with a Long Line of Cases Holding That Either a Judge or a Jury Can Make Eighth Amendment Capital Sentencing Findings Without Implicating the Sixth Amendment.

Walton rejected the argument that aggravating circumstances are elements of the crime that must be found by the jury. 497 U.S. at 648-49. As discussed above, *Walton* was not an aberration. *Proffitt, Spaziano, Cabana, Poland* and *Clemons* each rejected Ring's basic premise. *Hildwin v. Florida*, 490 U.S. 638 (1989), made a similar finding, holding that although Florida state law required that a jury return an advisory sentencing verdict, the Sixth Amendment did not require the jury to specify the aggravating factors permitting imposition of a death sentence.

In the years since *Walton* and *Clemons*, there has been extensive litigation of capital cases, but there have

been no reported cases criticizing or repudiating those decisions. As recently as 1997, this Court expressly affirmed the principles underlying those decisions. *See Lambrix v. Singletary*, 520 U.S. 518, 531 (1997) (reaffirming *Clemons*).

Even in *Apprendi*, this Court declined to criticize capital sentencing procedures carried out by a judge, rather than by a jury:

> [T]his Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling.

Apprendi, 530 U.S. at 496 (citations omitted).

Ring's argument ignores the historical underpinnings of *Walton*. He neglects even to mention *Cabana*, which is of particular significance because Ring was convicted of felony murder and the trial court made the requisite *Enmund/Tison* finding without any jury input. As *Walton* noted, arguments regarding "eligibility" for the death penalty apply equally to an *Enmund/Tison* finding made by a judge, rather than by a jury. 497 U.S. at 649.

The instant case does not overcome the doctrine of *stare decisis*. Although "*stare decisis* is not an inexorable command, . . . even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be

supported by some special justification." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations and internal quotation marks omitted).

Ring's claim does not present the special justification necessary to overrule *Walton*. Given the absence of any reported decisions suggesting that *Walton* and the cases cited above have made the death penalty process unfair or unreliable, there is no compelling reason for this Court to reverse itself.

II. RING'S SENTENCE SHOULD NOT BE VACATED EVEN IF *WALTON* IS OVERRULED BECAUSE THE EXISTENCE OF THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE SUPPORTING THE SENTENCE IS NECESSARILY IMPLIED IN THE JURY'S GUILTY VERDICTS OF FELONY MURDER AND ARMED ROBBERY.

Ring's sentence should be upheld regardless whether this Court overrules *Walton* in light of *Apprendi* because the jury's verdict necessarily implied the existence of the sole aggravating circumstance upon which the death sentence rests. Accordingly, Ring's death sentence was not "a greater punishment than that authorized by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494.

The jury convicted Ring of first-degree felony murder under A.R.S. § 13-1105(A)(2), which states:

> A person commits first degree murder if . . . [a]cting either alone or with one or more other persons the person commits or attempts to commit . . . robbery under § 13-1902, 13-1903 or 13-1904 . . . and in the course of and in furtherance of the offense or immediate flight

> from the offense, the person or another person causes the death of any person.

The jury also convicted Ring of armed robbery under A.R.S. §§ 13-1902 and 13-1904. Section 13-1902 states:

> A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

Section 13-1904 states:

> A person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person or an accomplice:
>
> 1. Is armed with a deadly weapon or a simulated deadly weapon; or
>
> 2. Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon.

The trial court instructed the jury that felony murder required a finding that the victim died during the commission of an armed robbery. (J. A. at 21a.)

Ring's death sentence rests solely on the aggravating circumstance of pecuniary gain, set forth in former A.R.S. § 13-703(F)(5)[3] as commission of murder "in expectation of the receipt . . . of anything of pecuniary value." The unanimous felony murder guilty verdict, the unanimous armed robbery guilty verdict, and the jury

[3] Now renumbered as A.R.S. § 13-703(G)(5).

instructions necessarily implied that Ring and his accomplices murdered the victim in expectation of the receipt of pecuniary gain, independently of any finding of fact made by the trial court.

The pecuniary gain finding derived from the fact that Ring and his accomplices committed the murder in expectation of receiving the money in the armored truck. The State cannot have proven the elements of felony murder and armed robbery without also necessarily proving that Ring committed the murder "in expectation of the receipt of anything of pecuniary value." The money taken from the armored truck was the property referred to in the robbery statute, A.R.S. § 13-1902, which the murderers took from Magoch's immediate presence by using deadly force to prevent his resistance to their taking it. *Ring*, 25 P.3d at 1154 ("Here, killing Magoch was for no other comprehensible reason than to facilitate the robbery.").

The record demonstrates that the jury indirectly, but conclusively, found the existence of the aggravating circumstance beyond a reasonable doubt. Any *Apprendi* error is harmless because Ring premises his Sixth Amendment claim upon the lack of a jury finding that he committed the murder "in expectation of the receipt of anything of pecuniary value," yet the jury effectively made the pecuniary gain finding. *See United States v. Pressler*, 256 F.3d 144, 157 n.7 (3rd Cir. 2001) ("The 'prescribed statutory maximum' is the longest sentence that a defendant could receive based solely on the facts necessarily encompassed within the jury's verdict of guilty."); *see also Keels v. United States*, 785 A.2d 672, 685 (D.C. App. 2001) (verdict necessarily implied

existence of enhancing factor found by sentencing court; no *Apprendi* violation because enhancement can be "predicated upon a jury finding beyond a reasonable doubt of, *or coextensive with*, that same factor." (emphasis added)); *United States v. Stewart*, 256 F.3d 231, 253 (4th Cir. 2001) (*Apprendi* violation harmless because "uncontested and overwhelming evidence" implied defendant's sentence would not have exceeded the statutory maximum but for erroneous jury instruction).

State v. Sansing, 26 P.3d 1118 (Ariz. 2001), does not compel a contrary conclusion. In *Sansing*, the Arizona Supreme Court found that although pecuniary gain was a motive for the defendant's decision to beat and bind the victim, her rape and murder "appear[ed] to be separate events." 26 P.3d at 1126. In contrast, in the present case, the murder was committed for the sole purpose of accomplishing a robbery. *Ring*, 25 P.3d at 1154. *Sansing* does not call into question the pecuniary gain finding in this case.

For the foregoing reasons, Ring's sentence should be upheld regardless whether this Court decides that the Sixth Amendment requires a jury determination of aggravating circumstances under A.R.S. § 13-703(F).

III. A DECISION TO OVERRULE *WALTON* SHOULD NOT BE RETROACTIVE.

In the event that this Court overrules *Walton*, it should not apply the decision retroactively. Decisions overruling precedent and establishing a new rule of constitutional law are applied retroactively to state and federal cases that are not yet final. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). "Final" for retroactivity

purposes refers to cases "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed.'" *Teague v. Lane*, 489 U.S. 288, 295 (1989) (plurality opinion) (quoting *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986)). In cases that are final, a Supreme Court decision establishing a new rule of constitutional law is "almost automatically nonretroactive." *Allen v. Hardy*, 478 U.S. 255, 258 (1986) (citing *Solem v. Stumes*, 465 U.S. 638, 646-47 (1984)).

Under *Teague*, a new constitutional rule does not apply to cases on collateral review unless it falls within one of two exceptions. 489 U.S. at 311 (plurality opinion). The first exception applies to new rules making certain conduct exempt from the legislature's power to define criminal acts. *Id*. This exception, which encompasses new interpretations of substantive law, is inapplicable here. *McCoy v. United States*, 266 F.3d 1245, 1256-57 n.16 (11th Cir. 2001); *Daniels v. United States*, 254 F.3d 1180, 1192 (10th Cir. 2001) (deciding in the context of a successive motion under 28 U.S.C. § 2255 that *Apprendi* falls outside *Teague*'s first exception); *United States v. Moss*, 252 F.3d 993, 997 & n.3 (8th Cir. 2001) (discussing the second exception as the only exception "[r]elevant to our inquiry"); *United States v. Sanders*, 247 F.3d 139, 148 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1237 (9th Cir. 2000). As this Court stated in *Apprendi*, "[t]he substantive basis for New Jersey's enhancement is . . . not at issue; the adequacy of New Jersey's procedure is." 530 U.S. at 475.

Under the second *Teague* exception, courts give retroactive effect to a "watershed" rule of criminal procedure that implicates the fundamental fairness and

accuracy of a criminal proceeding. 489 U.S. at 311-12 (plurality opinion). The holding in *Apprendi*, regardless whether it is expanded to overrule *Walton* by requiring a jury to find all facts necessary to impose a death sentence, does not raise serious questions about the fairness or accuracy of the sentencing process. Jury sentencing does not enhance the reliability of a death sentence; it is arguably less reliable than court sentencing. *See Proffitt*, 428 U.S. at 252 & n.10 (plurality opinion). Moreover, capital sentencing under A.R.S. § 13-703 requires proof of aggravating circumstances beyond a reasonable doubt. *See, e.g., State v. Djerf*, 959 P.2d 1274, 1286 (Ariz. 1998).

This Court has underscored the narrowness of this second exception by holding up the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example, and frequently reiterating the plurality's statement in *Teague*, 489 U.S. at 313, that new watershed procedural rules "would be so central to an accurate determination of innocence or guilt, we believe it is unlikely that many such components of basic due process have yet to emerge." *See, e.g., Graham v. Collins*, 506 U.S. 461, 478 (1993); *Butler v. McKellar*, 494 U.S. 407, 416 (1990); *Sawyer v. Smith*, 497 U.S. 227, 243 (1990). This Court has continued to repeat that admonition in the wake of *Apprendi*, implying that *Apprendi* is not a watershed rule. *Tyler v. Cain*, 533 U.S. 656, ___ n.7, 121 S.Ct. 2478, 2484 n.7 (2001).

Retroactive application of the *Apprendi* rule would be especially anomalous given this Court's decision in *DeStefano v. Woods*, 392 U.S. 631 (1968). There, this Court held that its decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), applying the Sixth Amendment jury

trial guarantee to the states through the Fourteenth Amendment, "should receive only prospective application." 392 U.S. at 633. If application of the Sixth Amendment *itself* is not retroactive, then neither is application of a new Sixth Amendment rule that requires a jury to decide the existence of every fact requisite to imposition of a capital sentence.

Consistent with the foregoing, courts that have examined *Apprendi* under the *Teague* retroactivity analysis have reached near consensus in finding that *Apprendi* is not retroactive. *See Moss*, 252 F.3d at 997 (*Apprendi* not a watershed rule that seriously diminishes fairness of trial; noting that an "overwhelming majority" of federal district courts had found *Apprendi* was nonretroactive); *Sanders*, 247 F.3d at 151 (because *Apprendi* affects fact-finder and standard of proof for only one element out of several, change is not "a watershed rule of criminal procedure which 'alter(s) our understanding of the bedrock elements essential to the fairness of a proceeding.'") (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)); *McCoy*, 266 F.3d at 1258; *Forbes v. United States*, 262 F.3d 143, 145 (2d Cir. 2001); *Jones*, 231 F.3d at 1236; *Whisler v. State*, 36 P.3d 290, 299-300 (Kan. 2001); *People v. Helton*, 749 N.E.2d 1007, 1010 (Ill. App. 2001). *But see People v. Rush*, 757 N.E.2d 88, 99-100 (Ill. App. 2001).

Because the rule in *Apprendi* falls outside either of the *Teague* exceptions, as nearly all courts examining the issue have concluded, it should not be applied retroactively to cases in which the conviction and sentence are final.

CONCLUSION

Based on the foregoing authorities and arguments, the State of Arizona respectfully requests this Court to affirm the judgment of the Arizona Supreme Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

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21 pp

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
I. THIS CASE IS CONTROLLED BY *APPRENDI* AND THE CORE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN THAT CASE.	2
II. THE DOCTRINE OF *STARE DECISIS* CANNOT PRESERVE *WALTON* IN LIGHT OF *APPRENDI*.	10
III. THIS COURT SHOULD NOT CONSIDER THE STATE'S HARMLESS ERROR ARGUMENT.	13
CONCLUSION	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Amadeo v. Zant, 486 U.S. 214 (1988) 13

Apprendi v. New Jersey, 530 U.S. 466 (2000) .... *passim*

Arizona v. Fulminante, 499 U.S. 279 (1991) 14

Baker v. Carr, 369 U.S. 186 (1962) 1

Cabana v. Bullock, 474 U.S. 376 (1986) 12, 13

Carella v. California, 491 U.S. 263 (1989) 14

Chapman v. California, 386 U.S. 18 (1967) 15

Clemons v. Mississippi, 494 U.S. 738 (1990) 1, 15

Dickerson v. United States, 530 U.S. 428 (2000) .. 11

Duncan v. Louisiana, 391 U.S. 145 (1968) 5, 11

Griffith v. Kentucky, 479 U.S. 314 (1987) 1

Howard v. Fleming, 191 U.S. 126 (1903) 12

Jones v. United States, 526 U.S. 227 (1999) ...1, 4, 5, 12

McMillan v. Pennsylvania, 477 U.S. 79 (1986) ... 6, 7

Cited Authorities

Page

Neder v. United States, 527 U.S. 1 (1999) 14

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 12

Payne v. Tennessee, 501 U.S. 808 (1991) 10, 11

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 11

Proffitt v. Florida, 428 U.S. 242 (1976) 1

Rose v. Clark, 478 U.S. 570 (1986) 14

Sandstrom v. Montana, 442 U.S. 510 (1979) 14

Solem v. Helm, 463 U.S. 277 (1983) 12

State v. Carriger, 692 P.2d 991 (Ariz. 1984) 15

State v. Sansing, 26 P.3d 1118 (Ariz. 2001), *petition for cert. filed*, No. 01-7837 (U.S. Jan. 4, 2002) 15

United States v. Giovannetti, 928 F.2d 225 (7th Cir. 1991) 13

United States v. McLaughlin, 126 F.3d 130 (3d Cir. 1997) 13

Cited Authorities

	Page
United States v. Montgomery, 100 F.3d 1404 (8th Cir. 1996)	13
United States v. Pryce, 938 F.2d 1343 (D.C. Cir. 1991)	13
United States v. Rose, 104 F.3d 1408 (1st Cir. 1997)	13
United States v. Torrez-Ortega, 184 F.3d 1128 (10th Cir. 1999)	13
United States v. Varela-Rivera, 279 F.3d 1174 (9th Cir. 2002)	13
United States Constitution:	
Sixth Amendment	*passim*
Eighth Amendment	9
Statutes:	
18 U.S.C. § 2119	4
Ariz. Rev. Stat. Ann. § 13-703	6, 10
Ariz. Rev. Stat. Ann. § 13-703(A)	2
Ariz. Rev. Stat. Ann. § 13-1105(C)	2
Miss. Code Ann. § 99-19-101(7)	13

To a large extent, the briefs of the State of Arizona and its supporting *amici* are devoted to matters not directly relevant to the issue before the Court. For example, they argue at length that any decision in favor of petitioner should not be applied retroactively. *See* Resp. Br. 36-39; Ariz. Voice for Crime Victims Br. 9-16. That argument, however, has no bearing upon the disposition of this case, which comes to the Court on direct review. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).[1] The State and its *amici* also contend that the Sixth Amendment does not require jury sentencing. *See* Resp. Br. 26; Ala. Br. 12-19. But Petitioner has expressly eschewed the argument that the Sixth Amendment prevents a state from assigning the sentencing decision to the court. *See* Pet. Br. 36. Rather, we contend only that the Constitution requires that the jury find any aggravating circumstances necessary to allow the imposition of a death sentence. *Id.*[2]

When they do turn to the merits of this case, the State and its *amici* make plain that their real quarrel is not with the logic of petitioner's arguments, but instead with the logic of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999).

1. Petitioner accordingly takes no position on the question, except to suggest that the Court may prefer to consider it in a case in which both parties have a stake in its resolution, and can therefore provide "that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

2. For this reason, the State's repeated citations to *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Proffitt v. Florida*, 428 U.S. 242 (1976), and its suggestion that petitioner necessarily urges the overruling of those decisions (*see* Resp. Br. 10-11, 13-14), are also misplaced. In those cases, the juries engaged in the finding of aggravating circumstances.

The opposing briefs provide no reasoned distinction between this case and *Apprendi*, nor any reason to depart here from the Sixth Amendment rule the Court announced there.

I. THIS CASE IS CONTROLLED BY *APPRENDI* AND THE CORE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN THAT CASE.

A. The State's primary argument is that since Ariz. Rev. Stat. Ann. §§ 13-703(A) and 13-1105(C) list death as one of the possible sentences for first degree murder, death is therefore "within the range of punishment available for someone convicted of first-degree murder" and the rule announced in *Apprendi* does not apply. Resp. Br. 9-19. This argument rests entirely on the Court's statement in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Since it views the "statutory maximum" for first degree murder in Arizona as death, the State argues that *Apprendi* does not forbid the State from assigning the duty for finding the facts that increase a defendant's punishment from life to death to a judge. Resp. Br. 8, 14-16.

This argument simply misreads *Apprendi*. The critical holding in *Apprendi* is that the Sixth Amendment jury trial guarantee extends to any factual finding that would "expose the defendant to a greater punishment than that *authorized by the jury's guilty verdict*." 530 U.S. at 494 (emphasis added). It is thus plain that when *Apprendi* refers to the "statutory maximum," it means the maximum sentence that can be imposed under law on the basis of the facts found by the jury, not a greater sentence that can be imposed only if a

judge finds additional "aggravating" facts. The Court expressly stressed the constitutional "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83 (emphasis in original). *See also id.* at 499 (the Sixth Amendment guarantees "the right to have a jury determine those facts that determine the maximum sentence the law allows") (Scalia, J., concurring); *id.* at 501, 502, 521 (right to jury trial extends to the finding of "every fact that is by law a basis for imposing or increasing punishment") (Thomas, J., concurring).

At a minimum, therefore, *Apprendi* stands for the proposition that, when State law expressly makes the finding of a particular fact necessary for imposition of a maximum sentence, the Sixth Amendment guarantees a defendant's right to have that fact found by a jury. Here, Arizona's legislature has made a determination, explicitly set forth in its statutes, that capital punishment is not an available option for a defendant convicted of first degree murder unless the State establishes one of ten specific aggravating circumstances. The presence or absence of one of these facts is thus not simply something that a judge may consider in deciding where to sentence a defendant within a statutory "range" authorized by the jury's verdict. Rather, an Arizona judge *cannot* impose the death sentence absent a finding of these factors. *See* Pet. App. 25a-26a. Under both the language and logic of *Apprendi*, the Sixth Amendment jury trial guarantee applies to the finding of such facts.

While the State accuses petitioner of citing too often to the Court's language in *Apprendi* (Resp. Br. 24), its

alternative is to give the Court's statements no effect whatsoever. Moreover, the State's single-minded focus on "range of punishment" is directly contrary to *Jones*. The federal carjacking statute at issue there, 18 U.S.C. § 2119, provided that a person in possession of a firearm who takes a motor vehicle may be imprisoned for "(1) . . . not more than 15 years . . . ; (2) if serious bodily injury . . . results, . . . not more than 25 years . . . and (3) if death results, . . . for any number of years up to life . . ." *See Jones*, 526 U.S. at 230. The "range of punishment" available for a defendant convicted of violating Section 2119 was therefore up to life, but Congress had expressly provided that sentences beyond fifteen years were available only if "serious bodily injury" from use of the firearm was proved, and beyond twenty-five years only if "death result[ed]." In order to avoid the very Sixth Amendment question later decided in *Apprendi*, the Court interpreted this single section of the United States Code as establishing three separate offenses, each of which must be submitted to a jury for its verdict. *See id.* at 251-52.

The statute at issue in *Jones* is indistinguishable from the Arizona statutes at issue here. Like the federal carjacking statute, which allows sentences of more than fifteen years only upon proof of serious bodily injury or death, Arizona law allows punishment for first degree murder in excess of imprisonment for life only upon proof of one of ten specified aggravating factors. This Court suggested in *Jones* – and subsequently expressly confirmed in *Apprendi* – that the Sixth Amendment right to jury trial applies to the Section 2119 aggravating factors of bodily injury or death.[3] The same right to jury trial is applicable to the aggravating circumstances at issue here.

3. *See Apprendi*, 530 U.S. at 490 ("our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*").

More importantly, the State's "range of punishment" argument contravenes core values of the Sixth Amendment. This Court has made plain that a bedrock principle of the Sixth Amendment guarantee of jury trial is that twelve ordinary citizens – not the State itself (in the form of a judge) – are interposed between a defendant and the imposition by the State of the maximum punishment allowed by law. Once the State has specified the facts necessary for the imposition of that punishment, it is the constitutional role of those citizens, not the State, to find those facts. *See Apprendi*, 530 U.S. at 484 ("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached"); *Jones*, 526 U.S. at 241 (Sixth Amendment protections extend to any "fact which the State deems so important that it must be either proved or presumed") (internal quotation marks omitted).[4] *See also Apprendi*, 530 U.S. at 498 (Sixth Amendment grounded on the refusal of the "founders of the American Republic . . . to leave [criminal justice] to the State") (Scalia, J., concurring); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment right of jury trial is an "inestimable safeguard against the . . . compliant, biased, or eccentric judge"). The State's "range of punishment" argument abandons this principle entirely, and therefore must fail.

4. *See also Apprendi*, 530 U.S. at 501 ("if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny") (Thomas, J., concurring).

B. The State also attempts to distinguish this case from *Apprendi* on the ground that petitioner's indictment gave him "notice that he might receive a death sentence," while the indictment in *Apprendi* gave the defendant "no means of discerning that he was subject to a sentence enhancement or the grounds upon which the enhancement could rest." Resp. Br. 19-20. It is clear, however, that this purported "deficiency in the New Jersey scheme" (*id.* at 20) played no role in the decision in *Apprendi*. This Court expressly said so, noting that "Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment," and explaining that it therefore did "not address the indictment question separately today." *Apprendi*, 530 U.S. at 477 n.3. *See also id.* (noting that the Sixth Amendment does not "include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

C. Relying on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the State also argues that the "aggravating circumstances" in Ariz. Rev. Stat. Ann. § 13-703 are not "elements" of first degree murder, but instead "sentencing factors." Resp. Br. 20-26. *See also* Ala. Br. 22-25. The State concedes that if the identical factors had been incorporated into "the substantive definition of 'capital murder,' " they would be "elements" of the crime to which "the jury trial guarantee obviously attaches." Resp. Br. 25. However, arguing that Arizona has chosen to treat the aggravating circumstances as "sentencing factors," the State contends that they are wholly irrelevant – "a matter of largesse" – for Sixth Amendment purposes. *Id.* at 26.

Apprendi is precisely to the contrary. New Jersey contended there that the racial motivation factor was not an

"element" of the crime, but instead a "sentencing factor." *See Apprendi*, 530 U.S. at 492. This Court held, however, that such "[l]abels do not afford an acceptable answer." *Id.* at 494 (internal quotation marks omitted). Rather, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* If so, *Apprendi* teaches, the fact is a "functional equivalent of an element" of the crime (*id.* at 494 n.19), and the Sixth Amendment requires the finding to be made by a jury. *See also Apprendi*, 530 U.S. at 521 ("If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element.") (Thomas, J., concurring).[5]

Apprendi expressly limited the holding in *McMillan* to cases that do not involve the imposition of a sentence more severe than that allowed by the jury's verdict, and suggested that even that narrow holding was subject to future reconsideration. 530 U.S. at 487 n.13. Since there was a "differential in sentence between what Apprendi would have received without the finding of biased purpose and what he could receive with it," the Court held that New Jersey's reliance on *McMillan* was misplaced. *Id.* at 495. The same is

5. Contrary to one *amicus* (Criminal Justice Legal Found. ("CJLF") Br. 10), this "purely functional definition" of "element" is plainly the Court's, not that of the defendant. *See Apprendi*, 530 U.S. at 494 n.19 (describing a circumstance that allows increase in punishment beyond that allowed by jury's verdict as "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict"). As the Court noted in *Apprendi*, this "functional" approach has the added virtue of avoiding embroilment in the "constitutionally novel and elusive distinction between elements and sentencing factors." *Id.* at 494 (internal quotation marks omitted).

true here – there is an obvious differential in sentence between what petitioner could have received under Arizona law without the finding of an aggravating circumstance and what he did receive with it.

D. The State argues that the Sixth Amendment right to jury trial cannot encompass the aggravating factors required under Arizona law for the imposition of a death sentence, since such factors were unknown at the time the Amendment was adopted. Resp. Br. 27. But despite the State's quarrels with petitioner's characterization of the historical record, it does not – and cannot – dispute the essential point: In 1791, the jury's guilty verdict with respect to the crime of capital homicide (as was true for all crimes) included within it all factual findings necessary to allow the imposition of the maximum sentence allowed by law. *Apprendi* teaches that the Sixth Amendment codifies the Framers' contemporary understanding that American citizens would continue to be guaranteed that a jury of their fellow citizens, not a judge, would be required to find whatever facts the establishment of which the State from time to time deemed necessary to allow the imposition of the maximum sentence allowed by law.[6]

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6. Petitioner does not contend that a defendant is entitled under the Sixth Amendment to a jury trial with respect to those facts which may *mitigate* the possibility of the maximum sentence allowed by law. Thus, the suggestion of one *amicus* that the Arizona statutory scheme can be analogized to the practice of "benefit of clergy" (CJLF Br. 3-8) is entirely misplaced. "Benefit of clergy" permitted imposition of *less* than the maximum sentence authorized by the jury verdict; in contrast, Arizona law allows the court to *exceed* the maximum sentence authorized by the jury verdict upon a finding of aggravating circumstances.

This jury trial guarantee does not disappear simply because a State has since 1791 statutorily "narrowed" the group of murder defendants who may be punished by death. Pennsylvania effectively "narrowed" its law in 1794 to provide that not all murders would be punished by death, and to require proof of one or more additional facts – premeditation, use of poison, lying in wait, or murder during the commission of a specified felony – as a prerequisite to capital punishment. *See* Pet. Br. 27. If, as the State suggests, the right to jury trial applies only to the issues that a jury decided in 1791, it would be possible today for Pennsylvania to assign the factual issue of premeditation solely to a judge for decision. But there can be no question that premeditation must, under the Sixth Amendment, be submitted to the jury. The "narrowing" facts that Arizona now requires to be found in order to subject petitioner to the death sentence can receive no different constitutional treatment.

E. We anticipated and answered in our opening brief the argument that Arizona's statutory aggravating circumstances somehow fall outside the Sixth Amendment jury trial guarantee because they were adopted in response to this Court's Eighth Amendment jurisprudence, or because the Eighth Amendment constrains the State's ability to punish all murders with death. *See* Pet. Br. 31-32. But the State expressly foregoes any such contention: "The State has never contended that its Eighth Amendment motivations in enacting the statute insulate it from attack on Sixth Amendment grounds." Resp. Br. 24.

The State thus effectively concedes that the Arizona capital punishment statutes are subject to the same constitutional analysis as would obtain if State law instead provided that first degree murder was punishable by fifty

years in prison, and specified that the prison sentence could be increased to life upon proof of one or more of precisely the same aggravating factors specified in Ariz. Rev. Stat. Ann. § 13-703. Since *Apprendi* would clearly guarantee a jury trial as to the aggravating circumstances under such a statute, no different result is possible here.

II. THE DOCTRINE OF *STARE DECISIS* CANNOT PRESERVE *WALTON* IN LIGHT OF *APPRENDI*.

While conceding the "tension between the language in *Apprendi* and the capital sentencing statute upheld in *Walton*" (Resp. Br. at 27), the State urges that the doctrine of *stare decisis* nonetheless requires continued adherence to *Walton*. *Id.* at 32-33. *See also* CJLF Br. 14-27; Ala. Br. 7-10. But "[*s*]*tare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotation marks omitted). The policy applies with least force in "constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (internal quotation marks omitted). Thus, this Court has never hesitated to overturn constitutional decisions that no longer withstand scrutiny. *See id.* at 828-30 & n.1 (listing thirty-three constitutional decisions that had been overruled in whole or in part in the twenty Terms preceding *Payne* and noting that *Payne* overruled two more).

The State argues that continued adherence to *Walton* is appropriate because there is no evidence that the denial of the right to a jury with respect to the finding of aggravating circumstances has "made the death penalty process unfair or unreliable." Resp. Br. 33. This argument, however, is wholly irrelevant to Sixth Amendment analysis. As this Court has

noted, "[a] criminal process which was fair and equitable but used no juries is easy to imagine." *Duncan*, 391 U.S. at 149 n.14. But rather than simply serving efficiency and fairness, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* at 156. Given this clear constitutional policy, a criminal defendant's right to jury trial cannot be abrogated simply on the assumption that judges perform the fact-finding function as well as or better than juries.

Nor is this a case where purported reliance justifies continued adherence to a now unsupportable decision. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828 (citations omitted). Only a small minority of the States have adopted capital punishment statutes which exclude the jury from the finding of aggravating circumstances. *See* Pet. Br. 37-38 & nn.35, 36. Even in those States, the rule that petitioner urges would overturn no convictions. At most, what the State and its *amici* fear are further sentencing proceedings (and, if the State's position regarding retroactivity is accurate, such proceedings would be required only for defendants whose cases are on direct appeal). While not trivial, this is hardly akin to the reliance concerns that informed such decisions as *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), or *Dickerson v. United States*, 530 U.S. 428 (2000).

Finally, the State and its *amici* urge that *Walton* was not inconsistent with a number of previous decisions of this Court. *See* Resp. Br. 31-33; Ala. Br. 8-10 & n.6; CJLF Br. 14-17. But this of course may be said about many overruled decisions of this Court. In any event, we do not claim that the difficulty with *Walton* is its inconsistency with its immediate predecessors; rather, the fatal flaw with *Walton* is that it is contrary to the Court's *later* decision in *Apprendi*. When "intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). In light of *Apprendi* and *Jones*, this is precisely such a case.[7]

7. Contrary to the State (Resp. Br. 32), it is not necessary for the Court to confront today the more difficult question of the effect of *Apprendi* on the continued vitality of *Cabana v. Bullock*, 474 U.S. 376 (1986). While *Apprendi* involves the finding of specific facts expressly required by state statutes to allow imposition of the maximum penalty allowed by law – a determination historically the province of a jury – *Cabana* starts from the premise that a jury has already found all facts necessary under State law for the imposition of capital punishment and instead involves a function traditionally performed by the Court – proportionality review. *See Cabana*, 474 U.S. at 385 (describing *Enmund/Tison* review as a form of proportionality review). *See, e.g., Howard v. Fleming*, 191 U.S. 126, 136 (1903) (holding ten year sentence for conspiracy not cruel "for an offense of the nature disclosed by the testimony"); *Solem v. Helm*, 463 U.S. 277 (1983) (holding that proportionality review involves an examination by the court of the circumstances of defendant's crime). If, as petitioner claims, his sentence of death was improperly imposed because he was denied a jury trial regarding the existence of a statutory aggravating circumstance, the *Cabana* holding will be

(Cont'd)

III. THIS COURT SHOULD NOT CONSIDER THE STATE'S HARMLESS ERROR ARGUMENT.

The State contends that even if the Arizona statutory scheme improperly removed from the jury the finding of facts necessary for the imposition of petitioner's death sentence, this Court should affirm the sentence since the error was "harmless." Resp. Br. 33-36. The State never made this argument below, nor did the Arizona Supreme Court consider it. Thus, it is questionable that this argument has been preserved for review. *See Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988) (alternative ground for affirmance must be properly raised below).[8] But even if the issue has not been

(Cont'd)
implicated in this case only if (a) the State develops procedures for findings of aggravating circumstances by the jury; (b) the State seeks such further jury proceedings in petitioner's case; and (c) in those proceedings, the State decides (contrary to the practice in other States) to remove from the jury the opportunity to make *Enmund/Tison* findings. *Cf.* Miss. Code Ann. § 99-19-101(7) (West, WESTLAW through 2001 2d Ext. Legis. Sess.) (requiring jury to make *Enmund/Tison* findings). If that day arrives, it will be time enough then to consider the effect of *Apprendi* on *Cabana*.

8. Although this Court does not appear to have expressly determined whether a harmless error argument can be waived, most courts of appeal have so held. *See, e.g., United States v. Varela-Rivera*, 279 F.3d 1174, 1180 (9th Cir. 2002); *United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997); *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997); *United States v. Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996); *United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991). *Cf. United States v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991) (while harmless error argument can be waived, court of appeals has discretion to undertake harmless error analysis where record is "short and straightforward").

waived, this Court's settled practice is not to consider in the first instance harmless error claims not ruled upon by the courts below. *See Neder v. United States*, 527 U.S. 1, 25 (1999); *Carella v. California*, 491 U.S. 263, 266 (1989); *Sandstrom v. Montana*, 442 U.S. 510, 526-27 (1979).

This case provides no occasion for departure from the Court's practice. As an initial matter, the State's argument would require the Court to determine whether the Arizona statute's categorical denial of the right to jury trial with respect to aggravating circumstances could ever be harmless error. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (unlike an "error in the trial process itself," such as the admission of inadmissible evidence, "structural defects in the constitution of the trial mechanism" cannot be harmless). *Cf. Rose v. Clark*, 478 U.S. 570, 578 (1986) (refusing to find harmless error where jury trial right has been "altogether denied").

More importantly, the State's argument would require the Court to engage in a difficult process of applying state law to the facts of this case. The Arizona Supreme Court has repeatedly held that the pecuniary gain aggravator is *not* automatically established by simultaneous convictions for first degree felony murder and robbery. Rather, the State must also prove that the motivation for the murder, as opposed to the robbery, was pecuniary gain. Thus, under Arizona law,

> [T]he State must prove additional facts to prove the aggravating circumstance of pecuniary gain once it has proved the robbery. . . . To prove robbery, the state must show a *taking* of property from the victim; to prove pecuniary gain, the state must show the actor's *motivation* was the expectation of pecuniary gain. Proving a taking in a robbery does not necessarily prove the motivation for a murder. . . .

State v. Carriger, 692 P.2d 991, 1010 (Ariz. 1984) (emphases in original) (citations omitted). *See also State v. Sansing*, 26 P.3d 1118, 1124 (Ariz. 2001), *petition for cert. filed*, No. 01-7837 (U.S. Jan. 4, 2002) (holding that "murder committed in the context of a robbery or burglary is not per se motivated by pecuniary gain"). Arizona law requires a "highly fact-intensive inquiry" to establish the required link between a murder and expected pecuniary gain. *Id.* at 1125.

The Arizona Supreme Court pointedly noted that the trial record in this case "provided almost nothing about *why* [the victim] was killed." Pet. App. 29a (emphasis added). Therefore, the State's argument that the jury impliedly found that the murder was motivated by pecuniary gain is directly contrary to the opinion below.[9] This is thus simply not an appropriate case for this Court to affirm the judgment below on the basis of harmless error. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (reviewing court must declare error "harmless beyond a reasonable doubt").[10]

9. The State stresses the Arizona Supreme Court's statement that the killing was "for no other comprehensible reason than to facilitate the robbery." Resp. Br. 35 (*quoting* Pet. App. 34a). This statement, however, appears in a discussion of the facts that the trial judge found on the basis of the evidence presented at the *sentencing hearing* as well as the trial (*see* Pet. App. 33a-34a), and therefore provides no basis for an argument as to what the jury necessarily found on the basis of the trial evidence.

10. Of course, nothing in the Constitution requires that Arizona courts conduct a harmless error analysis, even assuming that the State has not waived the argument. *See Clemons*, 494 U.S. at 754.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed insofar as it affirms the death sentence imposed on petitioner.

Respectfully submitted,

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TIMOTHY STUART RING,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Arizona

BRIEF FOR *AMICI CURIAE* ALABAMA, COLORADO, DELAWARE, FLORIDA, IDAHO, INDIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK DISTRICT ATTORNEYS ASSOCIATION, PENNSYLVANIA, SOUTH CAROLINA, UTAH, VIRGINIA, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. This Court's Ruling in *Walton* v. *Arizona* — That Judges May Perform the Channeling Function Required By *Furman* v. *Georgia* Through the Application of Statutory Aggravators — Has Not Proven In Any Way Unworkable 7

II. The States Have Placed Considerable Reliance Upon the Validity of *Walton* 8

III. This Court's Ruling in *Apprendi* v. *New Jersey* Did Not Undermine the Validity of *Walton* 10

A. The common law history to which this Court referred in *Apprendi* confirms that judges may take into account facts not found by the jury so long as they do not impose a sentence beyond the maximum prescribed for the crime 11

B. Because judicial capital sentencing does not increase the maximum punishment to which the defendant is exposed following the verdict of guilt, it is consistent with *Apprendi* 20

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Adarand Constructors, Inc. v. *Pena*,
515 U.S. 2001 (1995) 5

Agostini v. *Felton*,
521 U.S. 203 (1997) 3

Apprendi v. *New Jersey*,
530 U.S. 466 (2000) ..... passim

Beck v. *Alabama*,
447 U.S. 625 (1980) 22, 25

Blystone v. *Pennsylvania*,
494 U.S. 299 (1990) 9

Brightwell v. *State*,
41 Ga. 482 (Ga. 1871) 17

Cabana v. *Bullock*,
474 U.S. 376 (1985) 9

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 5

Clemons v. *Mississippi*,
494 U.S. 738 (1990) 9

Commonwealth v. *Smith*
1 Mass. 245, 1804 WL 709 (Mass. 1804) 15

Dickerson v. *United States*,
530 U.S. 428 (2000) 5, 10

Duncan v. *Louisiana*,
391 U.S. 145 (1968) 12

Enmund v. *Florida*,
458 U.S. 782 (1982) 9

Ex parte Giles,
632 So. 2d 577 (Ala. 1993) 12

Furman v. *Georgia*,
408 U.S. 238 (1972) ..... passim

George v. *People*,
47 N.E. 741 (Ill. 1897) 13

Godfrey v. *Georgia*,
446 U.S. 420 (1980) 4, 23

Gregg v. *Georgia*,
428 U.S. 153 (1976) 3, 22

Harris v. *Alabama*,
513 U.S. 504 (1995) 10

Hildwin v. *Florida*,
490 U.S. 638 (1989) 9, 25

Hohn v. *United States*,
524 U.S. 236 (1998) 5

Hope v. *Commonwealth*,
50 Mass. 134 (1845) 17

Hubbard v. *United States*,
514 U.S. 695 (1995) 6, 8

In re Shannon B.,
22 Cal. App. 4th 1235,
27 Cal. Rptr. 2d 800 (1994) 14

Jones v. State,
63 Ga. 141 (Ga. 1879) 17

Jones v. *State*,
416 S.W.2d 412 (Tex. Crim. App. 1967) 13

Jones v. *United States*,
526 U.S. 227 (1999) 6

Lacy v. *State*,
1862 WL 951 (Wis. 1862) 18

Lewis v. *Jeffers*,
497 U.S. 764 (1990) 4

Maynard v. *Cartwright*,
486 U.S. 356 (1988) 4, 22

McMillan v. *Pennsylvania*,
477 U.S. 79 (1986) 12, 22

Paterson v. *State*,
674 N.E.2d 528 (Ind. 1996) 13

Planned Parenthood of Southeastern Pennsylvania v. *Casey*,
505 U.S. 833 (1992) ..... passim

Poland v. *Arizona*,
476 U.S. 147 (1986) 1, 3, 23, 28

Proffitt v. *Florida*,
428 U.S. 242 (1976) 9, 12, 21, 26

Roberts v. *Louisiana*,
428 U.S. 325 (1976) 26

South Central Bell Telephone v. *Alabama*,
526 U.S. 160 (1999) 6

Spaziano v. *Florida*,
468 U.S. 447 (1984) ..... passim

State v. *Cohen*,
604 A.2d 846 (Del. 1992) 13

State v. *Hamey*,
67 S.W. 620 (Mo. 1902) 13

State v. *Hoffman*,
851 P.2d 934 (Idaho 1993) 13

State v. *Perley*,
30 A. 74 (Me. 1894) 17

State v. *Ring*,
25 P.3d 1139 (Ariz. 2001) 25, 27

State v. *Wedge*,
652 P.2d 773 (Or. 1982) 13

United States v. *Gaudin*,
515 U.S. 506 (1995) 10

United States v. *Tucker*,
404 U.S. 443 (1972) 15, 18

Walton v. *Arizona*,
497 U.S. 639 (1990) ..... passim

Williams v. *New York*,
337 U.S. 241 (1949) 15, 19, 20

Wisconsin v. *Mitchell*,
508 U.S. 476 (1993) 27, 28

Witte v. *United States*,
515 U.S. 389 (1995) 7

Woods v. *State*,
169 S.W. 558 (Tenn. 1914) 13

Woodson v. *North Carolina*,
428 U.S. 280 (1976) 25

Statutes

A.R.S. § 13-1105(c) (2001) 27

Mass.Rev.Stat., ch. 126, § 17 (1836) 17

Other Authorities

Brief of the United States in *Harris* v. *United States*, No. 00-10666 11

1 Bishop, Criminal Procedure § 85 (2nd ed. 1872) 17

1 Bishop, Criminal Procedure § 85 (3rd ed. 1880) 17

1 Bishop, Criminal Procedure § 85 (4th ed. 1895) 17

Black's Law Dictionary 143 (6th ed. 1991) 22

Joel Samaha, *Fixed Sentences and Judicial Discretion in Historical Perspective*, 15 William Mitchell L. Rev. 217 (1989) 14

INTEREST OF AMICI CURIAE

Amicus curiae State of Alabama, together with fourteen other states and organizations, submits this brief in support of the State of Arizona, urging this Court to affirm the judgment of the Arizona Supreme Court in this case and to reaffirm this Court's ruling in *Walton* v. *Arizona*, 497 U.S. 639 (1990). At issue in this case is the effect of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), on Arizona's practice of requiring its judges, after a jury verdict finding a defendant guilty of a capital crime, to find specific aggravating circumstances not found by the jury before imposing a sentence of death. Many of amici are states that also involve their judges in the capital sentencing process. They have done so in reliance upon this Court's approval of judicial capital sentencing in *Walton* and other cases. While the ruling in this case may not necessarily invalidate those states' various capital sentencing schemes, they nonetheless have a strong interest in seeing that this Court's capital jurisprudence, ensuring the validity of judicial capital sentencing, remains intact.

In addition, even those states that place capital sentencing authority in the jury have an interest in the issue whether sentencing proceedings following a conviction for capital murder fall outside the holding of *Apprendi*. This Court has recognized that aggravating circumstances are "not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986). A contrary determination — that aggravating circumstances are, in fact, elements of the offense that must be submitted to a jury and proven beyond a

reasonable doubt — may also affect the validity of certain jury capital sentencing schemes.

SUMMARY OF ARGUMENT

The practice of requiring a trial judge to find aggravating circumstances in order to impose capital punishment was not only affirmed by this Court in *Walton* v. *Arizona* but developed in response to *Furman* v. *Georgia* and this Court's subsequent Eighth Amendment jurisprudence. The rule of *Furman* and *Walton* authorizing the practice is a workable one, upon which many amici have relied in numerous cases, and it is consistent with the principle articulated by this Court two terms ago in *Apprendi* v. *New Jersey*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. 466, 490 (2000). The rule should not be invalidated.

In *Apprendi*, this Court explained that, once a jury has found a defendant guilty of all the elements of an offense that by statute entitles the prosecution to a certain maximum penalty, a judge may then decide whether to impose that maximum penalty, or a lesser one, taking into account a variety of facts not necessarily submitted to or considered by the jury. Because the maximum penalty in a capital case is death, *Apprendi* permits judges to apply statutory aggravators in capital sentencing. 530 U.S. at 496-497 (2000). Moreover, this Court has previously and repeatedly recognized that capital aggravating circumstances are not elements of the offense; rather, they are guidelines to channel the sentencer's discretion in determining whether to impose

the death penalty. See, e.g., *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986) (aggravating circumstances are not separate penalties or offenses but rather are standards to guide the making of the choice between the alternative verdicts of death and life imprisonment).

The doctrine of stare decisis thus counsels against the overruling of *Walton* and the invalidation of judicial capital sentencing. (Amici understand it is not judicial capital sentencing per se, but judicial capital sentencing on the basis of mandatory statutory aggravators not found by the jury, that is at issue in this case. For the sake of shorthand, however, amici will refer to this practice throughout this brief as "judicial capital sentencing.") A decision must do more than raise questions about the theoretical underpinnings of a prior decision in order to warrant its overruling. It must render the prior decision "manifestly erroneous," a "mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 857 (1992) (plurality opinion). To reject a line of jurisprudence absent "bona fide changes in our decisional law" would do "violence to the legitimacy we derive from reliance on" the doctrine of stare decisis. *Agostini* v. *Felton*, 521 U.S. 203, 239 (1997). This Court should accordingly reaffirm *Walton* v. *Arizona*, permitting judicial capital sentencing, and affirm the judgment of the Arizona Supreme Court.

ARGUMENT

In *Furman* v. *Georgia*, this Court ruled that unconstrained discretion in capital sentencing violated the Eighth Amendment. 408 U.S. 238 (1972) (per curiam). In response, at least thirty-five states adopted new capital sentencing procedures. *Gregg* v. *Georgia*, 428 U.S. 153, 179 (1976). "Since *Furman*," this Court has

"insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988) (citing *Gregg* v. *Georgia*, 428 U.S. at 189 (plurality opinion of Stewart, Powell, and Stevens, JJ.)). To accomplish this task, states must utilize "clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Lewis* v. *Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (internal quotation marks omitted)).[1] Nine states, all of whom are amici, have elected to meet these requirements by assigning to the trial judge, at least in part, the responsibility of considering and applying sentencing factors. These states are Alabama, Arizona, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska.[2] In *Walton* v. *Arizona*, this Court upheld

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[1] "Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing — effectively requiring capital sentencing proceedings separate from the adjudication of guilt, . . . dictating the type and extent of discretion the sentencer must and must not have . . . ." *Walton* v. *Arizona*, 497 U.S. 639, 657 (1990) (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

[2] See Ala. Code §§ 13A-5-43 – 13A-5-52 (LEXIS through 2001 Legis. Sess.); Ariz. Rev. Stat. Ann. § 13-703 (West & West Supp. 2001); Colo. Rev. Stat. § 16-11-103 (LEXIS through 2001 Legis. Sess.); Del. Code Ann. tit. 11, § 4209 (LEXIS through 2001 Legis. Sess. 141st Gen. Assemb.); Fla. Stat. § 921.141 (LEXIS through 2001 Legis. Sess.); Idaho Code § 19-2515 (LEXIS through 2nd Legis. Sess. 55th Legis.);

Arizona's scheme, thereby affirming the constitutional validity of judicial capital sentencing. 497 U.S. 639, 655 (1990).

"When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). Stare decisis is "'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). "'Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.'" *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)).[3]

Ind. Code Ann. § 35-50-2-9 (LEXIS through 2001 Legis. Sess.); Neb. Rev. Stat. Ann. §§ 29-2520 – 29-2523 (LEXIS through 2001 Legis. Sess.); Mont. Code Ann. §§ 46-18-301 – 46-18-306 (LEXIS through 2001 legislation); but see Mont. Code Ann. § 46-1-401 (2001).

[3] See also *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) ("[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'") (quoting *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 856 (1996);

In determining whether this "special justification" exists, this Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." *Planned Parenthood*, 505 U.S. at 854 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.). The considerations relevant to this analysis include the workability of the precedent in question, relevant reliance on the precedent, and the relation of the precedent to other changes in the law. See *South Central Bell Telephone* v. *Alabama*, 526 U.S. 160, 166 (1999) (citing *Planned Parenthood*, 505 U.S. at 854-55). Because judicial capital sentencing has proven workable, was created in reliance upon this Court's interpretation of the Eighth Amendment, and has not been undermined by recent precedent including *Apprendi*, this Court should reaffirm its constitutional viability. To do otherwise would be an exercise in "laying traps for unwary States, and generating a fundamental uncertainty in the law that shows no signs of ending or even diminishing." *Walton*, 497 U.S. at 673 (Scalia, J., concurring in part and concurring in the judgment); see also *Jones* v. *United States*, 526 U.S. 227, 271 (1999) (Kennedy, J., dissenting)

Hubbard v. *United States*, 514 U.S. 695, 712 n. 11 (1995) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation") (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

("[S]tates should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence must now be treated as offense elements for determination by the jury").

I. This Court's Ruling in *Walton* v. *Arizona* — That Judges May Perform the Channeling Function Required By *Furman* v. *Georgia* Through the Application of Statutory Aggravators — Has Not Proven In Any Way Unworkable.

The first question posed by the doctrine of stare decisis is "whether the rule has proved to be intolerable simply in defying practical workability." *Planned Parenthood*, 505 U.S. at 854 (citing *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116 (1965)).[4] The purpose of the channeling requirement in *Furman* and subsequent cases was to make capital sentencing more equitable and uniform.[5] The *Walton* rule permitting judges to perform this function by applying statutory aggravators is clear

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[4] See also *Witte* v. *United States*, 515 U.S. 389, 406 (1995) (Scalia, J., concurring) (finding no violation of the Double Jeopardy Clause based upon a refusal to give stare decisis effect to jurisprudence that "is not only wrong but unworkable as well") (citing *Planned Parenthood*, 505 U.S. at 982-84 (Scalia, J., concurring in judgment in part and dissenting in part)).

[5] See *Walton*, 497 U.S. at 664 (Scalia, J., concurring in part and concurring in the judgment) ("Pursuant to *Furman*, and in order to achieve a more rational and equitable administration of the death penalty, we require that States channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance") (citations and quotations omitted).

and practical. Ring offers neither argument nor evidence that judicial capital sentencing has in any way proven difficult or contrary to the purposes of *Furman*. While it may have engendered opposition, it has in no way proven unworkable. See *Planned Parenthood*, 505 U.S. at 855 (mere opposition is insufficient to establish that jurisprudence is, or has become, "unworkable").

II. The States Have Placed Considerable Reliance Upon the Validity of *Walton*.

The second question posed by stare decisis is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Planned Parenthood*, 505 U.S. at 854. "*Stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (quoting *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991)). "The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained. Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." *Hubbard* v. *United States*, 514 U.S. at 716 (Scalia, J., concurring in part and concurring in the judgment) (quoting The Federalist No. 78, p. 471 (C. Rossiter ed. 1961)).

While *Apprendi* involved a question not previously resolved, this case raises a claim confronted and rejected by the Court directly in *Walton* and indirectly on-

numerous other occasions under both the Sixth and Eighth Amendments.[6] This precedent is "integrated into

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[6] See, e.g. *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) ("This Court . . . has never suggested that jury sentencing in a capital case is constitutionally required[,] [a]nd it would appear that judicial sentencing should lead, if anywhere, to greater consistency in the imposition at the trial court level of capital punishment because a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases"); *Spaziano* v. *Florida*, 468 U.S. 447 (1984) (Sixth Amendment not offended by judge imposing sentence of death where jury has recommended sentence of life imprisonment); *Cabana* v. *Bullock*, 474 U.S. 376 (1985) (Constitution permits appellate court — rather than requires jury or trial court — to determine if the intent element required by *Enmund* v. *Florida*, 458 U.S. 782 (1982), has been satisfied); *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986) (sentencing factors are "not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment") (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 438 (1981)); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (reaffirming rejection of claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death); *Clemons* v. *Mississippi*, 494 U.S. 738 (1990) (Neither Sixth nor Eighth Amendments preclude appellate court from upholding a death sentence based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of aggravating and mitigating evidence or by harmless error review); *Walton* v. *Arizona*, 497 U.S. 639 (1990) (States are not required to denominate capital "aggravating circumstances" as "elements" of the offense or permit only a jury to determine existence of such circumstances); *Blystone* v. *Pennsylvania*, 494 U.S. 299, 306-307 (1990) (Constitution does not require a State to ascribe any specific weight to particular factors either in aggravation or mitigation to be considered by the sentencer); *Harris* v. *Alabama*,

the fabric of the law" and has "engendered substantial reliance." *Adarand*, 515 U.S. at 233; see also *Planned Parenthood*, 505 U.S. at 856. In reliance upon this precedent, many states have enacted or continued to employ legislation providing for judicial capital sentencing. Pursuant to these statutes, approximately 800 inmates are currently under a sentence of death.[7] Overruling *Walton* would cast doubt on the validity of a great number of these sentences, obtained and defended at considerable effort and expense. The reliance that the states have placed upon *Walton* is thus immense.

III. This Court's Ruling in *Apprendi* v. *New Jersey* Did Not Undermine the Validity of *Walton*.

The third question posed by stare decisis is "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine." *Planned Parenthood*, 505 U.S. at 855; cf. *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (this Court has overruled precedents "when subsequent cases have undermined their doctrinal underpinnings"); *United States* v. *Gaudin*, 515 U.S. 506, 521 (1995) (this Court has

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513 U.S. 504 (1995) (Eighth Amendment not violated by trial judge overriding jury life recommendation without according "great weight" to that jury recommendation as required by the state law of Alabama's sister state, Florida).

[7] This total broken down by State is as follows: Alabama 188; Arizona 128; Colorado 6; Delaware 17; Florida 385; Idaho 20; Indiana 39; Montana 6; and, Nebraska 6. See NAACP Legal Defense and Educational Fund, Inc., Quarterly Report by the Criminal Defense Project, Death Row U.S.A. at 21-22 (Fall 2001). These numbers have fluctuated slightly (e.g., Colorado presently has five death row inmates — two sentenced by a trial judge), but remain essentially correct.

overruled a precedent if it "has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court"). *Walton* is hardly a "remnant of abandoned doctrine." To the contrary, the capital sentencing scheme upheld in *Walton* comports fully with the holding and reasoning of *Apprendi*. *Apprendi* did not modify the longstanding rule that judges can find facts, including facts not considered or found by the jury, for purposes of imposing a sentence within a prescribed sentencing range. This is all that happens when a judge is assigned the responsibility of performing the channeling function required by the Eighth Amendment.

A. The common law history to which this Court referred in *Apprendi* confirms that judges may take into account facts not found by the jury so long as they do not impose a sentence beyond the maximum prescribed for the crime.

Two Terms ago in *Apprendi*, this Court reviewed the common law history that underlies the Sixth Amendment and concluded that a judge could not sentence a defendant beyond the range prescribed by the criminal statute under which the defendant was tried and convicted. 530 U.S. 466 (2000). This Court cautioned, however, that "nothing in this history suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute." *Id.* at 481. Amici believe that this statement is historically accurate, constitutionally correct, and sufficient to dispose of this case. See generally Brief of the United States in *Harris* v. *United States*, No. 00-10666, at 31-36 (discussing how history supports this

Court's decision in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986)).

In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court made clear that the Sixth Amendment right to trial by jury is the right to have a jury pass on the ultimate question of guilt or innocence, not punishment. "The Sixth Amendment never has been thought to guarantee a right to a jury determination of" the criminal sentence. *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984); see also *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (This Court "has never suggested that jury sentencing is constitutionally required. [Rather] it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases").

Nor does state constitutional law provide such a right. In Alabama, juries have had no state constitutional duty or right to participate in criminal sentencing.[8] Likewise, amici are unaware of any court of last resort in any jurisdiction that has extended a constitutional right to

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[8] See *Ex parte Giles*, 632 So. 2d 577, 580 (Ala. 1993) ("'By the common law, the jury determined merely the guilt or innocence of the prisoner; and, if their verdict was guilty, their duties were at an end. They had nothing whatever to say as to the punishment to be inflicted. The court alone determined what the punishment should be, its extent and its severity; with that the jury had nothing to do. Their whole duty was discharged when the verdict of guilty was pronounced'") (quoting *Fields* v. *State*, 47 Ala. 603, 606 (1872)).

trial by jury to sentencing proceedings in a criminal matter.[9]

Rather than vesting a jury with the authority to impose punishment upon those it found guilty of criminal activity, Anglo-American jurisdictions have traditionally

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[9] See *Paterson* v. *State*, 674 N.E.2d 528, 541 (Ind. 1996) (stating that "the right to trial by jury under the Indiana Constitution is limited to the question of guilt or innocence"); *State* v. *Hoffman*, 851 P.2d 934, 939 (Idaho 1993) (interpreting state constitutional provision providing that "the right of trial by jury shall remain inviolate" and stating "it is well settled that punishment in a capital case is to be determined by a judge rather than a jury"); *State* v. *Cohen*, 604 A.2d 846, 852 (Del. 1992) (holding that "defendants are not guaranteed the right under the Delaware Constitution to have a jury determine punishment in a capital case"); *State* v. *Wedge*, 652 P.2d 773, 776 (Or. 1982) (stating that the Oregon constitutional right to jury trial does not "mandate jury participation in sentencing"); *Jones* v. *State*, 416 S.W.2d 412, 414 (Tex. Crim. App. 1967) (stating that "the constitutional right of trial by jury does not encompass the right to have the jury assess the punishment"); *Woods* v. *State*, 169 S.W. 558, 559 (Tenn. 1914) (interpreting the state constitutional right to trial by jury and stating that "it is not essential that the jury assess the punishment, unless the statutes of the state so direct"); *State* v. *Hamey*, 67 S.W. 620, 621-625 (Mo. 1902) (interpreting the constitutional provision providing that "the right of trial by jury as heretofore enjoyed shall remain inviolate" and stating that it "is limited to the trial of the question of guilt or innocence"); *George* v. *People*, 47 N.E. 741, 744 (Ill. 1897) (interpreting the constitutional provision providing "the right of trial by jury as heretofore enjoyed shall remain inviolate" and holding that "the language of the constitution was never intended to confer upon the jury a constitutional right to fix the term of imprisonment on the trial of a person indicted for a felony").

relied upon the trial court to make such sentencing determinations independent of the jury. As early as the first two decades of the Massachusetts Bay Colony, sentencing authority rested in the sound discretion of the trial court. Joel Samaha, *Fixed Sentences and Judicial Discretion in Historical Perspective*, 15 William Mitchell L. Rev. 217, 220-22 (1989).[10] As this Court recognized in *Apprendi*, "judges in this country have long exercised discretion [taking into consideration various factors relating both to offense and offender] in imposing sentence *within statutory limits* in the individual case." 530 U.S. at 481. In fact, "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind [and] the extent of punishment to be

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[10] See also *Apprendi*, 530 U.S. at 519 (Thomas, J., concurring) ("noting judges' broad discretion in setting amount of fine and length of imprisonment for misdemeanors, but praising determinant punishment and 'discretion . . . regulated by law'") (quoting 4 W. Blackstone, Commentaries on the Law of England 371-72 (1769)); see also *In re Shannon B.*, 22 Cal. App. 4th 1235, 1240, 27 Cal. Rptr. 2d 800, 803 (1994) (citing 1 Joseph Chitty, The Criminal Law 711 (2d ed. 1826); 1 J. Stephen, A History of the Criminal Law of England, ch. 13 (1883)) (punishment for many English capital felonies was discretionary, with a wide variety of sanctions available other than death, which was "left to the wisdom of the court").

imposed within limits fixed by law." *Williams* v. *New York*, 337 U.S. 241, 246 (1949).[11]

The common law cases and nineteenth century criminal procedure treatise cited in Justice Thomas's concurring opinion in *Apprendi*, 530 U.S. at 502, are entirely consistent with this principle. The Massachusetts larceny statute applied in *Commonwealth* v. *Smith* (cited by Justice Thomas, *id.*) imposed a sentence of treble damages — three times the amount stolen. 1 Mass. *245, 1804 WL 709. The court in *Smith* held that it could not sentence the defendant for stealing goods whose value was not alleged in the indictment. The court thus eliminated all sentencing discretion on its part and put the questions of guilt *and* sentence entirely in the hands of the jury. But this holding should not be seen as questioning the common law legitimacy of judicial sentencing discretion. Had the judge in *Smith* not insisted that the amount stolen be alleged in the

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[11] This Court's "periodic recognition of judges' broad discretion in sentencing — since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range . . . has [however] been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature." *Apprendi*, 530 U.S. at 481-82 (citations omitted); see also *United States* v. *Tucker*, 404 U.S. 443, 447 (1972) ("The Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review"); *Williams*, 337 U.S. at 247 (the judge's task in sentencing is to impose, "within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt" has been resolved).

indictment, he would have arrogated to himself the power to impose a literally infinite range of punishment, based on a finding of fact neither considered by the jury nor necessarily proven beyond a reasonable doubt.

This is a far different case from one in which the statute assigns a fixed range of punishment — even one with a very high maximum — but leaves to the trial judge the discretion to sentence the convicted defendant, on the basis of a variety of factors not necessarily considered by the jury, within that fixed range. The treatise cited by Justice Thomas makes this point clear:

> The reader should distinguish between the foregoing doctrine, and the doctrine stated elsewhere that, within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment. *Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances.* The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy. This is an entirely different thing from punishing one for what is not alleged against him.

1 Bishop, Criminal Procedure § 85, at 54 (2nd ed. 1872) (emphasis added) (internal citation omitted); see also 1 Bishop, Criminal Procedure § 85, at 50 (3rd ed. 1880); 1 Bishop, Criminal Procedure § 85, at 50 (4th ed. 1895).

As Justice Thomas recounted in *Apprendi*, 530 U.S. at 503 & n. 3, Massachusetts amended its larceny statute in 1836 to create two different ranges of punishment, depending on whether the amount stolen exceeded $100.[12] While the amount stolen thus remained an element of the crime because it changed the applicable range of punishment, *Hope* v. *Commonwealth*, 50 Mass. 134 (1845), the fact that the judge now had discretion to sentence within the applicable range was not problematic. Other states likewise had property crime statutes in the nineteenth century that gave judges the discretion to sentence within statutorily prescribed ranges.[13] This

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[12] "Every person who shall commit the offence of larceny, by stealing of the property of another any money, goods or chattels [or other sort of property], if the property stolen shall exceed the value of one hundred dollars, shall be punished by imprisonment in the state prison, *not more than* five years, or by fine *not exceeding* six hundred dollars, and imprisonment in the county jail, *not more than* two years; and if the property stolen shall not exceed the value of one hundred dollars, he shall be punished by imprisonment in the state prison or the county jail, *not more than* one year, or by fine *not exceeding* three hundred dollars." Mass.Rev.Stat., ch. 126, § 17 (1836) (emphasis added).

[13] See, e.g., *Brightwell* v. *State*, 41 Ga. 482, 483 (Ga. 1871) (Georgia arson statute provided for judicial sentencing discretion within a prescribed range); *Jones* v. *State*, 63 Ga. 141, 143 (Ga. 1879) (Georgia burglary statute provided for discretionary sentencing within prescribed ranges of punishment); *State* v. *Perley*, 30 A. 74 (Me. 1894)

same system of discretionary judicial sentencing within legislatively prescribed boundaries continues to be a dominant feature of the American criminal justice system. See *Apprendi*, 530 U.S. at 481-83, 497 (affirming the legal principle of discretionary judicial sentencing within a range prescribed by statute).

Within the American federal system, a judge could thus "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972).[14] This

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(Maine robbery statute provided that "punishment for the crime may be as high as imprisonment for life, and it may be as low as any term of years, which might be two"); *Lacy* v. *State*, 1862 WL 951, at *2-3 (Wis. 1862) (Wisconsin arson statute allowing for discretionary judicial sentencing within statutorily prescribed ranges).

[14] *Tucker* cites the following federal cases: *United States* v. *Trigg*, 392 F.2d 860, 864 (7th Cir. 1968) ("That some of the considerations affecting the court's exercise of informed discretion in fixing the sentence did not stem from the presentence report or from what the court observed from trial demeanor or testimony does not, of itself, invalidate the sentence"); *Davis* v. *United States*, 376 F.2d 535, 538 (5th Cir. 1967) (recognizing that it is permissible for the judge to consider presentence data concerning prior convictions in determining sentence); *Cross* v. *United States*, 354 F.2d 512, 514-515 (D.C. Cir. 1965) (holding that sentence imposed by the trial judge was not improper even though it was based in part upon knowledge gleaned by the judge during the trial of a co-defendant); *United States* v. *Doyle*, 348 F.2d 715, 721 (2nd Cir. 1965) ("The narrowing of the indictment to a single count limits the maximum punishment the court can impose but not the scope of the court's consideration within the maximum"); *United States* v. *Magliano*, 336 F.2d 817, 822 (4th Cir. 1964) ("After conviction, everything of possible pertinency may be considered,

discretion was bounded only by the requirement that the sentence fall within the statutory limits. *Apprendi*, 530 U.S. at 467; see also *Tucker*, 404 U.S. at 447 (recognizing that the broad latitude afforded a federal judge in making a sentencing determination is clearly circumscribed by the absolute requirement that the sentence fall with the statutorily prescribed range).

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though it has no competency as proof of what it purports to indicate"); Fed. R. Crim. Pro. 32(a)(2) (providing for the consideration, by federal judges, of presentence investigation reports containing information about a convicted criminal as it proves helpful in sentencing); *Williams* v. *New York*, 337 U.S. at 247 (A judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined . . . [a]nd modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial"); *North Carolina* v. *Pearce*, 395 U.S. 711, 723 (1969) ("A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'").

B. Because judicial capital sentencing does not increase the maximum punishment to which the defendant is exposed following the verdict of guilt, it is consistent with *Apprendi*.

It is thus well established that the Constitution is not offended by a state legislature attaching a range of punishment to a particular offense and giving the trial judge discretion to select a punishment within that range. *Apprendi* acknowledged and reaffirmed that principle. 530 U.S. at 481 ("[N]othing . . . suggests that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment *within the range* prescribed by statute"). Moreover, until this Court struck down the use of unguided discretionary capital sentencing schemes in *Furman*, no distinction was made between offenses punishable by death and those carrying lesser criminal sanctions.[15] See *Williams*, 337 U.S. at 251

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[15] It is true that throughout this Nation's history — including the present — many states have placed the authority to impose a death sentence in the jury. See *Spaziano* v. *Florida*, 468 U.S. at 472 (Stevens, J., concurring in part and dissenting in part) (noting that "of 42 jurisdictions that employed discretionary capital sentencing in 1948, only 3 did not require its imposition through jury determinations which the trial judge could not disregard" and "[a]t the time of *Furman*, only 2 . . . permitted a death sentence to be imposed without the consent of a jury"). Unlike that of the Eighth Amendment, however, this Court has never identified an "evolving" standard governing the meaning of the Sixth Amendment right to trial by jury. That a majority of state legislatures chose, at a particular time, to place capital sentencing authority in the jury did not, therefore, make sentencing in a capital case part of the Sixth Amendment right to trial

(upholding sentence of death imposed following jury's recommendation of life imprisonment; "[l]eaving a sentencing judge free to avail himself of out-of-court information . . . does secure to him a broad discretionary power"). *Furman*, however, "which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion," changed that rule in capital cases. *Walton*, 497 U.S. at 657 (Scalia, J., concurring in part and concurring in the judgment). Capital punishment is, in fact, the only punishment that constitutionally may not be imposed pursuant to an unguided discretionary sentencing scheme.[16]

Sentencing proceedings following a conviction for capital murder necessarily fall outside the holding of *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

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by jury. *Spaziano*, 468 U.S. at 459 ("[T]he Sixth Amendment never has been thought to guarantee a right to a jury determination of [the appropriate punishment to be imposed on an individual]"); *id.* at 463, n. 8 (rejecting proposition that "because juries may sentence, they constitutionally must do so").

[16] For example, this Court has never read the Eighth Amendment to require that "after a person is convicted . . . , there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to" life in the penitentiary. *Proffitt*, 428 U.S. at 259. In a capital case, however, following a conviction, "[t]he sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant." *Spaziano*, 468 U.S. at 459.

jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. A capital offense is one that, by definition, carries a maximum sentence of death. *Black's Law Dictionary* 143 (6th ed. 1991) (defining capital case as "one for which death penalty may, but need not necessarily, be imposed"). When a judge makes factual findings to support the imposition of the death penalty, he is not enhancing the sentencing range for which a defendant would otherwise be ineligible. Rather, the judge is simply conducting a process designed to channel and rationalize the imposition of the death penalty.

"It was in *McMillan* v. *Pennsylvania* that this Court, for the first time, coined the term 'sentencing factor' to refer to a fact that was not found by a jury but could affect the sentence imposed by the judge." *Apprendi*, 530 U.S. at 485 (internal citation omitted). Although the term may have been "coined" in *McMillan*, "sentencing factors" are in the realm of capital punishment a product of this Court's Eighth Amendment jurisprudence.

More specifically, the birth of capital "sentencing factors" can be traced to this Court's decision in *Furman*. "In *Furman*, the Court held unconstitutional a Georgia statute that vested the jury with complete and unguided discretion to impose the death penalty or not as it saw fit, on the ground that such a procedure led to the 'wanton' and 'freakish' imposition of the penalty." *Beck* v. *Alabama*, 447 U.S. 625, 639 (1980) (Stewart, J., concurring) (quoting *Furman*, 408 U.S. at 310). "Since *Furman*, [this Court has] insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Maynard* v. *Cartwright*, 486 U.S. 356, 362 (1988) (citing *Gregg* v. *Georgia*, 428

U.S. 153, 189 (1976)) (plurality opinion of Stewart, Powell, and Stevens, JJ.). Compliance with the Court's decisions required the creation of sentencing factors. Indeed, without them, it would not be possible to "channel the sentencer's discretion by 'clear and objective standards that provide specific and detailed guidance.'" *Godfrey* v. *Georgia*, 446 U.S. at 428 (plurality opinion).

There is, therefore, plainly a distinction between capital aggravating circumstances and the type of "sentencing enhancement" at issue in *Apprendi*. Unlike a "sentencing enhancement," aggravating circumstances do not serve to increase the range of punishment to which one is exposed following a finding of guilt. An individual found guilty of a capital offense is eligible for and exposed to a death sentence upon conviction. Aggravating circumstances provide the channeling function required by the Eighth Amendment; they do not increase the sentencing range to include that for which a defendant would otherwise be ineligible. The unique purpose served by aggravating circumstances has been repeatedly upheld. They are "not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Poland*, 476 U.S. at 156 (quoting *Bullington* v. *Missouri*, 451 U.S. 430, 438 (1981)). An aggravating circumstance cannot, therefore, be "appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi*, 530 U.S. at 495 (quoting *McMillan*, 477 U.S. at 88).

In *Apprendi*, the Court noted: "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment of the court as it existed during the years surrounding our

Nation's founding." *Apprendi*, 530 U.S. at 478 (footnote omitted). What may have been unknown at the time of the founding has, however, become a constitutional necessity in cases where the offense is punishable with a sentence of death. A State may not impose the death penalty simply by increasing the number and specificity of the elements required to convict. In the capital context, therefore, the "distinction between 'elements' and 'sentencing factors'" is not "constitutionally novel" but constitutionally required. Compare *Apprendi*, 530 U.S. at 494 (referring to the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors'").

Apprendi did not render "the term 'sentencing factor' [ ] devoid of meaning." 530 U.S. at 494 n. 19. Rather, "[t]he term appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Id.* This is precisely the manner in which "sentencing factors" are used in the context of Arizona's capital punishment statute.

Ring was charged with first-degree murder. There is no dispute that he was properly convicted of that offense pursuant to a jury trial wherein the jurors found the existence of each element of the offense beyond a reasonable doubt. There can also be no dispute that the offense carried with it the possible imposition of a death sentence. Unlike *Apprendi*, where the finding at issue "increased — indeed, it doubled — the maximum range within which the judge could exercise his discretion," *id.* at 474, the aggravating factors in Ring's case merely served to guide the judge's discretion within the established range. Accordingly, the Arizona sentencing process and this Court's decision in *Walton* are fully

consistent with *Apprendi*. It is this reading of *Apprendi*, and not that suggested by Ring, which reconciles the holding with the longstanding history of judicial discretion in sentencing proceedings, the understanding that "the Sixth Amendment never has been thought to guarantee a right to a jury determination" of the sentence, *Spaziano*, 468 U.S. at 459, and the Court's specific application of that understanding to the imposition of the death penalty. See, e.g., *Hildwin* v. *Florida*, 490 U.S. 638, 640 (1989) (acknowledging and affirming prior rejection of "claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death").

Nor is a different result compelled by the Arizona Supreme Court's statement: "In Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." *State* v. *Ring*, 25 P.3d 1139, 1151 (Ariz. 2001). This statement is true everywhere, not just in Arizona, because of the Eighth Amendment. A defendant can never be sentenced to death based on the "jury's verdict alone." Sentencing factors in a capital case are required because, no matter how a State defines the elements of a capital offense, the Eighth Amendment requires additional proceedings before a sentence of death may be imposed.

Indeed, "[s]ome States responded to *Furman* by making death the mandatory punishment for certain categories of murder." *Walton*, 497 U.S. at 661 (Scalia, J., concurring). The Court, however, rebuffed those efforts, invalidating the statutes on the basis that they "raised the same possibility that the death penalty would be imposed in an arbitrary and capricious manner as the statute held invalid in *Furman*." *Beck*, 447 U.S. at 640; see also *Woodson* v. *North Carolina*, 428 U.S. 280 (1976);

Roberts v. *Louisiana*, 428 U.S. 325 (1976). While the class of individuals who are subject to the death penalty may be narrowed through the classification of elements defining a capital offense, the Eighth Amendment requires more. "*[A]fter a person is convicted* of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." *Proffitt*, 428 U.S. at 259 (emphasis added). Capital punishment is, therefore, unique in that it is the only punishment requiring — not pursuant to a statute passed by a state legislature, but by mandate of this Court — that further factual findings be made after a jury has found the existence of every element necessary to convict. The sentencing considerations required by the Eighth Amendment should not and cannot be classified as elements of the offense. It is impossible to incorporate "the unique circumstances of the individual defendant" as an element of the offense. *Spaziano*, 468 U.S. at 459.

Accordingly, even in states that use judicial sentencing in capital cases but require the jury first to find aggravating circumstances, the judge must still make a determination that those aggravating circumstances outweigh any mitigating circumstances. This determination is constitutionally necessary to the imposition of the death penalty. Reading *Apprendi* to require that any finding necessary to impose a death sentence be found by a jury would therefore invalidate any sort of meaningful judicial sentencing in capital cases. It would require not only the overruling of *Walton* but the repudiation of the reasoning in numerous other decisions of this Court (see n. 6).

Ring's contention, that his death sentence violates *Apprendi* because the "jury verdict alone" is insufficient to

support a death sentence under Arizona law, is also premised on a misunderstanding of the meaning of "statutory maximum" in *Apprendi*. The statutory maximum is determined by assessing the permissible range of punishment for a particular offense. Under Arizona law, first degree murder is classified as a class 1 felony and, as such, may be punished by death or life in prison. A.R.S. § 13-1105(c) (2001). Thus, a defendant is "exposed" to a sentence of death upon the jury's guilty verdict. Here, the jury's verdict exposed Ring to a sentencing range with a maximum of death.

Finally, contrary to Ring's assertion, this Court is not bound by the Arizona Supreme Court's statement that the range of punishment for a conviction of first degree murder is "on the basis of the verdict alone is life imprisonment with the possibility of parole or imprisonment for 'natural life' without the possibility of parole." *Ring*, 25 P.3d at 1151. In *Wisconsin* v. *Mitchell*, this Court considered a claim that Wisconsin's sentencing enhancement for discriminatory intent violated the First Amendment. 508 U.S. 476 (1993). Although the Wisconsin Supreme Court had determined that the enhancement statute violated the First Amendment "by punishing what the legislature has deemed to be offensive thought," rather than conduct, this Court rejected that analysis. More specifically, this Court stated:

> There is no doubt that we are bound by a state court's construction of a state statute. . . . But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. . . . This

> assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

Mitchell, 508 U.S. at 483-84 (internal citations omitted). Similarly, the Arizona Supreme Court's conclusion as to the maximum penalty permitted upon conviction for the first degree murder "merely characterizes the practical effect" of Arizona's death penalty statute. This Court may, therefore, form its own judgment as to its "operative effect."

Here, the operative effect of Arizona's statute is this: A verdict of guilt on a first degree murder charge exposes the defendant to the death penalty by authorizing additional procedures — procedures mandated by the Eighth Amendment for the purpose of distinguishing "between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460 (citing *Zant* v. *Stephens*, 462 U.S. 862, 873-880 (1983); *Furman*, 408 U.S. at 294 (Brennan, J., concurring)). That the trial judge made this determination based upon "'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment" does not render Ring's death sentence unconstitutional. *Poland*, 476 U.S. at 156 (quoting *Bullington*, 451 U.S. at 438).

CONCLUSION

For the foregoing reasons, *Walton* should not be overruled and the judgment of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

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No. 01-488

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of Arizona

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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36 pp

QUESTION PRESENTED

Should *Walton* v. *Arizona* and *Hildwin* v. *Florida*, which held that the Sixth Amendment does not require that eligibility factors in post-*Furman* capital sentencing systems be found by a jury, be overruled?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 2

Argument 3

I

Eligibility for benefit of clergy was the common law's closest analogue to "eligibility factors," and it was not an element of the offense 3

II

Defendant's purely functional definition of elements cannot be squared with *Mullaney*, *Patterson*, and *Edwards* 8

A. Rejection of the purely functional definition 8

B. An ameliorative innovation 10

III

Drawing the line between aggravating and mitigating facts would have the reform-inhibiting effect foreseen in *Patterson* 12

IV

To overturn a quarter century of consistent precedent despite massive reliance would be a monumental betrayal of public confidence in this Court 14

A. The precedents 14

B. Reliance 18

C. Public confidence 22

1. Frequent overruling 22

2. Intensely divisive controversy 26

Conclusion 27

TABLE OF AUTHORITIES

Cases

Adamson v. Ricketts, 865 F. 2d 1011 (CA9 1988) 16

Almendarez-Torres v. United States, 523 U. S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) .. 7, 12, 17, 21

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Barclay v. Florida, 463 U. S. 939, 77 L. Ed. 2d 1134, 103 S. Ct. 3418 (1983) 14, 15

Bigelow v. Superior Court, 208 Cal. App. 3d 1127, 256 Cal. Rptr. 528 (1989) 21

Clemons v. Mississippi, 494 U. S. 738, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990) 16

Dobbert v. Florida, 432 U. S. 282, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977) 11

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Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 11, 18, 23, 26

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96 S. Ct. 2909 (1976) 24, 26

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107 S. Ct. 708 (1987) 18

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109 S. Ct. 2055 (1989) 12, 15, 16

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107 S. Ct. 1821 (1987) 25

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117 S. Ct. 1544 (1997) 18

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98 S. Ct. 2954 (1978) 19, 25, 26

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12 S. Ct. 617 (1892) 23

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108 S. Ct. 546 (1988) 17

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97 S. Ct. 990 (1977) 14

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91 S. Ct. 1454 (1971) 11, 23

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384,
108 S. Ct. 1860 (1988) 19

Montana v. Egelhoff, 518 U. S. 37, 135 L. Ed. 2d 361,
116 S. Ct. 2013 (1996) 14

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95 S. Ct. 1881 (1975) 8

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97 S. Ct. 2319 (1977) 8, 9, 10, 11, 12, 13

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111 S. Ct. 2597 (1991) 18

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171 Cal. Rptr. 679 (1981) 13

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505 U. S. 833, 120 L. Ed. 2d 674,
112 S. Ct. 2791 (1992) 14, 18, 22, 26, 27

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96 S. Ct. 2960 (1976) 14, 15, 20, 24, 25

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104 S. Ct. 871 (1984) 17

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556 P. 2d 1101 (1976) 23, 24

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111 S. Ct. 2491 (1991) 13

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104 S. Ct. 3154 (1984) 12, 15

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State v. Sheets, 260 Neb. 325, 618 N. W. 2d 117 (2000) . 21

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112 S. Ct. 1130 (1992) 16

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107 S. Ct. 1676 (1987) 13

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18 U. S. C. § 3593 21

State Statutes

Ariz. Rev. Stat. § 13-1105(C) 7

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IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The defendant in this case asks this Court to declare unconstitutional a practice in use in nine states. It would also require a change in federal capital case indictments, overturning most, if not all, nonfinal federal capital cases. This change is

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

requested on the basis of an interpretation of the Sixth Amendment which this Court has emphatically rejected many times over many years. This disruption of settled practice and trampling upon the people's reliance on this Court's precedents is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Defendant and an accomplice carjacked and robbed a Wells Fargo armored van and murdered the driver. The jury convicted him of first-degree murder, conspiracy to commit armed robbery, armed robbery, burglary, and theft. *State* v. *Ring*, 25 P. 3d 1139, 1142 (Ariz. 2001). The trial judge found two statutory aggravating factors true: pecuniary gain and "especially heinous, cruel or depraved." *Id.*, at 1144. "The judge then determined that the mitigating evidence, when weighed against the aggravating evidence, was insufficient to call for leniency and sentenced Defendant to death for the murder." *Id.*, at 1145. The Arizona Supreme Court rejected the argument that *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) had rendered this procedure unconstitutional under the Sixth Amendment, instead holding that *Walton* v. *Arizona*, 497 U. S. 639 (1990) had not been overruled and was still the controlling precedent. *Ring*, *supra*, at 1152.

SUMMARY OF ARGUMENT

Apprendi's statement that any distinction between elements and sentencing factors was unknown at the time of the Founding is not entirely correct. For some felonies "benefit of clergy" was available, but not for all offenders. Whether a person convicted of a "clergyable felony," such as manslaughter, received the maximum for that offense (death) or a lesser penalty (branding and possibly jail) depended on the facts found in a post-verdict proceeding. Most of the facts were found by the judge. Jury participation was limited to one

specific question. History is consistent with the view that punishment within the statutory range may be determined by facts which are not elements of the crime.

A purely functional definition of "elements" cannot be squared with *Mullaney* v. *Wilbur*, *Patterson* v. *New York*, and *Edwards* v. *United States*. *Patterson* allowed the burden of proof of facts reducing murder to manslaughter to be placed on the defendant while *Mullaney* did not. The key difference was the legislative specification of elements versus affirmative defenses, even though the matters to be proved were functionally equivalent. *Edwards* rejected a Sixth Amendment attack on the practice of the trial judge finding facts which determined the sentence under the Sentencing Guidelines, because the sentence imposed was within the *statutory* maximum for the offense of conviction.

Defendant's argument is contrary to a quarter century of solid precedent. The people of nine states have a massive reliance interest in this precedent. To retry all the cases not yet final on direct appeal would be a massive expenditure and would put the victims' families through another cycle of trial and review. The loss of deterrent effect, recent studies indicate, would cost hundreds and possibly thousands of innocent lives.

For the reasons stated in *Planned Parenthood* v. *Casey*, yet another flip in this intensely divisive area of law would diminish public confidence in this Court.

ARGUMENT

I. Eligibility for benefit of clergy was the common law's closest analogue to "eligibility factors," and it was not an element of the offense.

Apprendi v. *New Jersey*, 530 U. S. 466, 478 (2000) states, "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as

it existed during the years surrounding our Nation's founding." (Footnote omitted). That is not entirely correct. The opinion goes on to say,

> "The defendant's ability to predict *with certainty* the judgment from the face of the felony indictment flowed from the *invariable* linkage of punishment with crime." *Ibid.* (emphasis added). The overstatement of this sentence is revealed by the citation which follows: "See 4 Blackstone 369-370 (after verdict, and barring a defect in the indictment, pardon, *or benefit of clergy*, 'the court must pronounce that judgment, which the law hath annexed to the crime' . . .)." *Id.*, at 478-479 (emphasis added, *Apprendi*'s emphasis deleted).

Apprendi thus skipped lightly over a major feature of common law sentencing.

The benefit of clergy began, as the name implies, as an exemption from punishment by secular courts for members of the clergy, as very broadly defined. See 4 Blackstone, Commentaries 358-359 (1st ed. 1769); 1 J. Stephen, History of the Criminal Law of England 459 (1883). Persons so exempted were tried in ecclesiastical courts and punished very lightly. See G. Dalzell, Benefit of Clergy in America 11 (1955). Later, any man who could read was assumed to be a clergyman, a fiction which drifted further from reality as learning spread. 4 Blackstone, at 360. In 1487, by statute, literate laymen were distinguished from actual clergymen, and the former could only claim the benefit once. 1 Stephen, at 462.

Offenders allowed the benefit of clergy were branded on the thumb to more readily identify them on the next offense. *Ibid.* After 1576, they were not turned over to the church, but rather jailed for up to one year. *Ibid.* The privilege was extended to peers without a reading requirement in 1547, and to women in all cases in 1692. *Ibid.* The reading test was routinely faked. See Dalzell, at 24-25. In 1705, it was abolished by statute. See 1 Stephen, at 462. As Blackstone notes, punishing the illiterate more severely than those who had received the benefit of education was backwards. 4 Blackstone, at 363. A further innovation in England was to punish offenders by sending them to America, *id.*, at 363-364, but this enhancement was obviously unavailable to colonial courts.

While the benefit of clergy was being extended to an expanding class of felons, it was also being restricted to a shrinking class of felonies. See 1 Stephen, at 469. The most important of these restrictions was among the first, eliminating the benefit in cases of "murder of malice prepensed." See 1 Stephen, at 464-465 (discussing statutes of 1531 and 1547); Acker & Lanier, Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death, 29 Crim. L. Bull. 291, 293, and n. 8 (1993). This became the distinction between murder and manslaughter. Acker & Lanier, at 294.

Defendant asserts that at common law murder was capital homicide and manslaughter was not, *i.e.*, that "the death penalty was only *available* for" murder. Brief for Petitioner 25. He is mistaken. Manslaughter was a "clergyable felony,"[2] while murder was a "felony without benefit of clergy." Both classes of felony were "death-eligible," to use a modern term, but the latter class meant death in every case, subject only to executive clemency. Repeat offenders could be and were hanged in America for clergyable felonies in the years just before the American Revolution, see Dalzell, at 152, and in some states into the nineteenth century. See *id.*, at 259.

In a nutshell, sentencing for homicide at the time of the American Revolution worked as follows. First, the jury would convict of either murder or manslaughter. "Malice aforethought" was an element of the crime of murder, which distinguished it from manslaughter. As an element, malice

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2. Except that stabbing another to death was not clergyable, even if it was manslaughter rather than murder. 4 Blackstone, at 193. This exception was construed so narrowly as to virtually repeal it. See *ibid.*

aforethought had to be specified in the indictment and proved to the trial jury. See 2 W. Hawkins, Pleas of the Crown, ch. 33, § 25, p. 342 (2d ed. 1726).

If the defendant was convicted of manslaughter, then the trial judge had to determine whether he was eligible for benefit of clergy. This meant determining whether a defendant claiming to be a clergyman really was, see 2 Hawkins, ch. 33, § 113, at 360, whether defendant was eligible as a peer, see Dalzell, at 22, and whether the defendant was ineligible as a repeat offender. See *id.*, at 152.

> "Who is to judge whether a Person who demands the Benefit of the Clergy, has a Right to it or not: I take it, That in all Cases the Temporal Judge is to determine both, whether the Crime be within the Benefit of the Clergy, and also whether the Person who demands it be qualified to demand it or not . . . ." 2 Hawkins, ch. 33, § 113, at 359.

Jury participation in the post-verdict eligibility determination was limited to one specific factual question. If the prosecution alleged a prior crime and prior use of the benefit of clergy, and the defendant denied he was the same person as the one tried in the earlier proceeding, a jury was empaneled "to try the question of identity in issue." 1 J. Chitty, Criminal Law *688 (1819); *State* v. *Carroll*, 24 N. C. 183, 184 (1842). Even so, recidivism was not an element of the offense, as it was not specified in the indictment or determined by the guilt-phase jury, and no question but identity was determined by a jury at all.

At the time of the American Revolution, benefit of clergy was the law in 12 of the 13 states. Dalzell, at 233. The most famous application was in the Boston Massacre case. Two of the British soldiers were convicted of manslaughter, granted benefit of clergy, burned on the hand, and released. See *id.*, at 204. This was accepted practice, even in a case as controversial as this one. *Ibid.*

Benefit of clergy did not survive long after the adoption of the Bill of Rights in most states. Broad penal reforms, including the building of state prisons, soon swept it into the dustbin of history. See *id.*, at 249 (Virginia, 1796); *id.*, at 252 (Maryland, 1810); *id.*, at 254 (New York, 1788); *id.*, at 255 (Massachusetts, 1785); *id.*, at 267 (Georgia, 1817). Even so, it was a part of the common law heritage and was a law in effect in most states at the time the Sixth Amendment was adopted.[3] A Sixth Amendment argument based on the law as it existed in 1791, see *Apprendi*, 530 U. S., at 478-480, necessarily fails if the rule asserted would have been inconsistent with the practice of benefit of clergy.

Certainly it is not true that every fact that went into the determination of punishment was an element of the offense. The fact that determined whether a homicide was clergyable manslaughter or nonclergyable murder was an element, but the facts that determined whether the manslaughter convict actually received the benefit were not. Common law practice was consistent with the distinction between elements and sentencing factors expressed in Justice Scalia's dissent in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 257, n. 2 (1998), quoted *infra*, at 17.

First-degree murder under Ariz. Rev. Stat. § 13-1105(C) is analytically similar to a "clergyable felony" in 1791. It is punishable by death or a lesser punishment, with the choice to be made in post-verdict proceedings. Those proceedings are not entirely discretionary but involve some fact-finding. While the law *may* assign some of the fact-finding to a jury, as the common law did with disputed identity in prior conviction cases, that does not make the fact an element of the offense or bring it within the Sixth Amendment. These sentencing factors

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3. In 1791, it had been abolished in Massachusetts and New York, as noted above, and it had never been the law in Connecticut. See *id.*, at 257.

may be found by judges, so long as the maximum punishment is within the range established for the offense.

II. Defendant's purely functional definition of elements cannot be squared with *Mullaney*, *Patterson*, and *Edwards*.

A. Rejection of the Purely Functional Definition.

Defendant argues for a purely functional definition of elements of the offense for constitutional purposes. See Brief for Petitioner 10. Under this view, it would be completely irrelevant how the legislature defines the elements of the offense or what it specifies as the maximum punishment for the base offense. Instead, courts would look only at what facts lead to what punishment and apply the constitutional protections of burden of proof, jury trial, and, in federal cases, indictment to the facts needed for the punishment. This purely functional approach cannot be reconciled with *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), *Patterson* v. *New York*, 432 U. S. 197 (1977), and *Edwards* v. *United States*, 523 U. S. 511 (1998).

Mullaney arose in a state with the traditional definitions of murder and manslaughter. "Malice aforethought" was the element of murder which distinguished it from manslaughter, but it was defined in the negative, as the absence of "heat of passion on sudden provocation." 421 U. S., at 686-687; see also *id.*, at 701-702 (discussing "proving a negative"). In these circumstances, placing the burden of proof on the defendant violated the Due Process Clause. See *id.*, at 703-704.

The other bookend of this pair is *Patterson* v. *New York*. The New York law at issue in that case did not make "malice" an element of second-degree murder, but instead required only intentional killing. 432 U. S., at 198. In place of the common law "malice" element, New York provided an affirmative defense of "extreme emotional disturbance," which would reduce the crime to manslaughter if proved by the defendant by

a preponderance of the evidence. *Id.*, at 199-200. The Court upheld this system, rejecting the argument that *Mullaney* controlled. See *id.*, at 214-216.

Mullaney and *Patterson* cannot be reconciled with a purely functional analysis. In both Maine and New York, the state could rest after proving only intentional killing. In both states, the defendant could not reduce the murder to manslaughter by raising only a reasonable doubt as to the existence of heat of passion or extreme emotional distress; instead, he had to affirmatively prove it. Yet one system was constitutional and the other was not.

The difference, says *Patterson*, was that in Maine malice "was part of the definition of [the] crime" of murder. *Id.*, at 216. The legislative definition of the elements does matter. Once the legislature declares an element, it cannot presume the element and shift the burden of proof, even though, within limits, it can *functionally* accomplish the same result by redefining the crime and its associated affirmative defenses.

Patterson noted that "there are obviously constitutional limits beyond which the States may not go" in changing elements into affirmative defenses. *Id.*, at 210. While the existence of those limits may be obvious, the extent of them is not. Since *Patterson*, the Court has not needed to define the limits because the legislatures have not pushed them. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Harris* v. *United States*, No. 00-10666, p. 19; Hoffman, *Apprendi v. New Jersey*: Back to the Future?, 38 Am. Crim. L. Rev. 255, 272 (2001).

Patterson held that the legislature may, within limits, redefine a degree-fixing element as an affirmative defense and place the burden of proof on the defendant. If so, there would seem to be no logical reason why it cannot, within limits, set a range of punishments for a single offense and structure the choice within that range based on facts to be determined at sentencing. That is, in essence, what the Sentencing Guidelines

do, and this Court rejected a constitutional attack on them just four years ago.

In *Edwards* v. *United States*, 523 U. S. 511, 512-513 (1998), the defendants were convicted of a cocaine conspiracy. The sentences were within the statutory range for any kind of cocaine. See *id.*, at 515. However, the sentence determination under the Guidelines required the judge, not the jury, to determine that the defendant's "illegal conduct had involved *both* cocaine *and* crack." *Id.*, at 513 (emphasis in original).

Under a purely functional analysis of the type proposed by defendant, the maximum legal sentence in *Edwards* would have been the *Guidelines* maximum based on the facts found by the jury verdict, which did not specify crack as opposed to powder. See *id.*, at 513; cf. Brief for Petitioner 10. Functionally, the defendants in *Edwards* could not be sentenced to more than the Guidelines provide for powder without a finding that crack was involved, and this finding, under defendant's theory, would have to be made by the jury and not the judge. Yet the *Edwards* Court unanimously rejected the Sixth Amendment argument, noting that the actual sentence did not "exceed[ ] the maximum that the *statutes* permit for cocaine-only conspiracy." 523 U. S., at 515 (emphasis added). *Apprendi* reaffirmed this holding. *Apprendi* v. *New Jersey*, 530 U. S. 466, 497, n. 21 (2000).

B. An Ameliorative Innovation.

Patterson noted that the ability of the legislature to redefine elements as defenses was not unlimited, and that drastic restructuring to evade the basic burden of proof requirement would be unconstitutional. See 432 U. S., at 210. Citing this portion of *Patterson*, *Apprendi* noted that a similar constraint could apply in the event of a hypothetical "extensive revision of the State's entire criminal code . . . ." 530 U. S., at 491, n. 16. The situation with capital punishment and "eligibility" factors is the antithesis of this hypothetical.

By requiring the finding of an aggravating factor to narrow the class of defendants eligible for capital punishment, Congress and the state legislatures have not removed constitutional protections from elements that traditionally had those protections. Instead, they created an entirely new requirement purely for the benefit of the defendant, compared to what the law was before. See *Dobbert* v. *Florida*, 432 U. S. 282, 294-295 (1977) (post-*Furman* changes "ameliorative"). Degrees of murder were invented in 1794 to narrow the eligible class, see *McGautha* v. *California*, 402 U. S. 183, 198 (1971), but no further narrowing occurred through 1971. See *id.*, at 199. The American Law Institute had proposed "aggravating circumstances" in substantially their present form in 1959, see *id.*, at 202, 223-224, but no state voluntarily adopted them. See *id.*, at 203. After *Furman* v. *Georgia*, 408 U. S. 238 (1972), they were widely adopted to meet the constitutional narrowing requirement. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994).

As an innovation in the law which operates purely in favor of the defendant relative to the traditional definition, death-eligibility sentencing factors are well within the constitutional limits indicated by *Patterson* and *Apprendi*. See *Patterson*, 432 U. S., at 207 (noting the new defense was "a substantially expanded version of the older heat-of-passion concept"). Under these decisions, legislatures have the power to define the elements of crimes and the range of punishments for them. Affirmative defenses and sentencing factors which reduce the offense or punishment or structure the sentencing decision with the statutory range are also within the legislative power. There is no danger that states will take advantage to remove from the jury the elements that traditionally defined first-degree murder and recharacterize them as "aggravating factors." It has been 26 years since *Proffitt*, with no movement in that direction yet. The principal legislative innovation since then has been to add new categorical exclusions, usually with the burden of proof on the defendant. See Cal. Penal Code § 190.5(a) (under 18, burden on defendant); Tr. of Oral Arg. in *Atkins* v. *Virginia*,

No. 00-8452, p. 13 (retardation, burden on defendant in every state). Ameliorative innovations may be stifled if a brickload of burdens automatically attaches to them. See *Patterson*, 432 U. S., at 207-208.

Apprendi is squarely premised on the consistency of its rule with all precedents except, possibly, *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). The *Apprendi* Court says a contrary ruling would have been a "rejection of the otherwise *uniform* course of decision during the *entire* history of our jurisprudence." 530 U. S., at 490 (emphasis added). To accept defendant's expansive interpretation of the *Apprendi* rule would require repudiation of *Apprendi*'s premise. Not only does he ask for overruling of *Walton* v. *Arizona*, 497 U. S. 639 (1990), as well as *Spaziano* v. *Florida*, 468 U. S. 447 (1984) and *Hildwin* v. *Florida*, 490 U. S. 638 (1989) (*per curiam*), see Brief for Petitioner 23, n. 16, defendant's interpretation of *Apprendi* is also inconsistent with a pair of well-established precedents that have been part of the fabric of the law for a quarter century and with a unanimous decision that predates *Apprendi* by only two years. Nor does it end there, as we will show in part IV, *infra*. Such an interpretation cannot be correct.

III. Drawing the line between aggravating and mitigating facts would have the reform-inhibiting effect foreseen in *Patterson*.

In *Apprendi* v. *New Jersey*, 530 U. S. 466, 501 (2000) (concurring opinion), Justice Thomas suggested a constitutional distinction between facts that increase punishment and facts that mitigate punishment. Drawing the line in this manner would distinguish *Patterson* v. *New York*, 432 U. S. 197 (1977) on its facts, but it would be inconsistent with the reasoning of that decision, as discussed in part II, *supra*. In addition, it would have the effect of inhibiting reforms, as *Patterson* warned against. See *supra*, at 11-12.

The traditional felony murder rule was that a participant in a robbery in which a person was killed was guilty of murder, even though he neither committed nor intended the killing, and 20 states even permitted the death penalty in such cases in post-*Furman* statutes. See *Enmund* v. *Florida*, 458 U. S. 782, 820 (1982) (O'Connor, J., dissenting). Under *Enmund* and *Tison* v. *Arizona*, 481 U. S. 137, 138 (1987), states may still impose the death penalty on a nontriggerman who intends to kill or acts with reckless disregard of human life.

Many would consider it a salutary reform to narrow the definition to exclude all persons lacking intent to kill. However, the state may be unwilling to shoulder the burden of proof. See *Patterson*, 432 U. S., at 207. The perpetrators of the felony are frequently the only living witnesses to the murder. Indeed, the victims are often killed precisely for the purpose of preventing their testimony. As one notorious criminal explained his cold-blooded murder of two teenage boys, " 'I couldn't have no punks running around that could do that [identify him], so I wasted them.' " *People* v. *Harris*, 28 Cal. 3d 935, 945, 623 P. 2d 240, 245 (1981).

California dropped its felony-murder special circumstance down to the *Tison* minimum precisely because of the difficulty of proof in the multiple perpetrators situation. See Cal. Penal Code § 190.2(d).[4] A partial affirmative defense of lack of intent would be far easier to enact if the burden of proof could be placed on the defendant. Yet under a straight aggravating/mitigating definition of "elements," intent to kill would surely be aggravating, and burden-shifting would be impermissible.

The *Patterson* Court had it right the first time. It is better to leave the specification of the elements of crimes to the legislative branch and permit innovation, so long as wholesale evasions are not attempted. See also *Schad* v. *Arizona*, 501

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4. The author of Proposition 115, which added this subdivision to § 190.2, so informed counsel for *amicus* at the time of the campaign.

U. S. 624, 639 (1991) (plurality opinion); *Montana* v. *Egelhoff*, 518 U. S. 37, 58 (1996) (Ginsburg, J., concurring in the judgment).

IV. To overturn a quarter century of consistent precedent despite massive reliance would be a monumental betrayal of public confidence in this Court.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 844 (1992). Yet 26 years after this Court held that jury sentencing is not constitutionally required, while reviewing a system where the sentencing included the finding of at least one aggravating circumstance, see *Proffitt* v. *Florida*, 428 U. S. 242, 250, 252 (1976) (lead opinion), that holding is still questioned. Cf. *Casey*, *supra*, at 844. It is astonishing that this question can even be seriously asked, given the duration, number, and consistency of precedents, but there is no doubt of the proper answer. The precedents should be emphatically reaffirmed.

A. The Precedents.

In 1976, this Court considered together five post-*Furman* capital sentencing systems. The pertinent case for present purposes is *Proffitt*, *supra*. The holdings of *Proffitt* are found in the joint opinion of Justices Stewart, Powell, and Stevens under the "narrowest grounds" rule. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977). The *Proffitt* Court fully understood that, given the jury override feature of Florida law, "[t]he sentencing authority in Florida [is] the trial judge . . . ." 428 U. S., at 251. The *Proffitt* Court further understood that the trial judge had to make the finding of an aggravating circumstance. See *id.*, at 250. As the plurality noted later in *Barclay* v. *Florida*, 463 U. S. 939, 954 (1983), this passage of *Proffitt* means that "the Florida statute . . . requires the sentencer [*i.e.*, the judge] to find at least one valid aggravating circumstance

before the death penalty may even be considered . . . ." The *Barclay* concurring opinion agreed, stating, "the *trial judge* must make three separate determinations in order to impose the death sentence: (1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt . . . ." *Id.*, at 961 (Stevens, J., concurring) (emphasis added). With this unmistakable understanding of what the sentencing phase in Florida required, *Proffitt* held that it was constitutionally permissible for this function to be performed by the judge rather than the jury. 428 U. S., at 252.

If *Proffitt* itself were not clear enough, the Court expressly addressed a Sixth Amendment challenge in *Spaziano* v. *Florida*, 468 U. S. 447, 458 (1984). This was a year after the further clarification of the Florida system in *Barclay*, *supra*. Spaziano's jury returned only a general recommendation of life imprisonment by majority vote, see *id.*, at 451, meaning that there was no jury finding of any aggravating circumstance. With the awareness that sentencing included the finding of an aggravating circumstance, the Court rejected the claim that the Sixth Amendment required it be done by a jury. See *id.*, at 459. The Court further noted it had already upheld the Florida system twice and then upheld it a third time. *Id.*, at 464-465.

Hildwin v. *Florida*, 490 U. S. 638 (1989) (*per curiam*) addressed the precise issue before the Court in the present case in unmistakable terms. "This case presents us *once again* with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that *permit* the imposition of capital punishment in Florida." *Id.*, at 638 (emphasis added). The question could not be stated more clearly. The answer is no. *Id.*, at 640-641. *Hildwin* further noted that this holding was necessarily included in the holding of *Spaziano*. See *id.*, at 640.

The *Hildwin* opinion was joined by seven Justices, including Justice Stevens, author of the *Spaziano* dissent. Justices Brennan and Marshall expressed no disagreement with the holding of the Court, but stated only their standard continuing refusal to abide by a landmark precedent, see *id.*, at 641

(Brennan, J., dissenting), and with the summary disposition. *Ibid.* (Marshall, J., dissenting). The question presented today was regarded 13 years ago as so well settled as to be appropriate for summary affirmance, *i.e.*, "the judgment below is thought to be so obviously correct and the conflicting decision so clearly wrong that the Court feels further consideration is unnecessary . . . ." R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 256 (7th ed. 1993).[5] The conflicting and clearly wrong decision was *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1027 (CA9 1988), cert. denied sub. nom *Lewis* v. *Adamson*, 497 U. S. 1031 (1990) (Rehnquist, C. J., and White and Scalia, JJ., dissenting, O'Connor and Kennedy, JJ., not participating).

This well-settled state of the law was resoundingly reaffirmed the next year. Rejecting a Sixth Amendment argument, *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990) stated, "Any argument that the Constitution requires that a jury impose the sentence of death *or make the findings prerequisite* to imposition of such a sentence has been *soundly rejected* by prior decisions of this Court." (Emphasis added). Thus, an appellate court could affirm a death sentence despite a vague definition of an aggravating circumstance by finding itself that the circumstance was true under the proper definition. See *id.*, at 751.[6]

By the time this Court addressed the present question in an Arizona case, there was not much left to say. The Florida cases were on point and controlling. See *Walton* v. *Arizona*, 497 U. S. 639, 647-648 (1990). Walton's claim that aggravating

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5. Stern, et al. proceed to discuss several other reasons why summary affirmance might be appropriate, none of which applies to *Hildwin*. See *id.*, at 256-257.

6. Aggravating circumstances serve the same function in Mississippi as they do in Florida, *i.e.* at least one must be found for eligibility and then they are "weighed" against the mitigating. See *Stringer* v. *Black*, 503 U. S. 222, 229 (1992); *id.*, at 234 (same as Florida).

circumstances are "elements" in Arizona and not in Florida was squarely rejected. *Id.*, at 648.

The opinion of the Arizona Supreme Court in the present case, on which the defendant places such reliance, see Brief for Petitioner 17-18, tells us nothing the Court has not long known. *Of course* the finding of an aggravating circumstance is a prerequisite to the imposition of a death sentence. See *State* v. *Ring*, 25 P. 3d 1139, 1152 (Ariz. 2001). That has been fully understood from the beginning to be true in Arizona, see *Arizona* v. *Rumsey*, 467 U. S. 203, 206 (1984), as well as Florida, see *supra*, at 14, Mississippi, California, see *Pulley* v. *Harris*, 465 U. S. 37, 51 (1984), and every other jurisdiction that has chosen to narrow its death penalty with aggravating (or "special") circumstances instead of defining a higher degree of murder. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) (noting two acceptable ways of narrowing); *id.*, at 244 (noting most states have gone the "aggravating circumstances" route). The correctness of Justice O'Connor's description of the Arizona system in *Apprendi* v. *New Jersey*, 530 U. S. 466, 538 (2000) (dissenting opinion), is not in doubt, so the Arizona Supreme Court's confirmation does not change anything. What is in doubt is her interpretation of the majority opinion as saying "the jury makes all of the findings necessary to expose the defendant to a death sentence." *Ibid.* The opinion of the Court in *Apprendi* does not say that. The relevant passage, *id.*, at 497, quotes Justice Scalia's dissent in *Almendarez-Torres* v. *United States*, 523 U. S. 224, 257, n. 2 (1998). That footnote says,

> "What the cited cases [*Walton*, *Hildwin*, and *Spaziano*] hold is that once a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed—*even where that decision is constrained by a statutory requirement that certain*

'aggravating factors' must exist." (Last emphasis added, other emphases in original).

Apprendi thus distinguished *Walton* on exactly the basis that the state distinguishes this case from *Apprendi*. If *Walton* was not controlling in *Apprendi*, as *Apprendi* itself flatly states, 530 U. S., at 496, then *Apprendi* cannot be controlling precedent in a case indistinguishable from *Walton*.

If a ≠ b and a = c then b ≠ c.

B. Reliance.

One of the most important considerations in deciding whether to overrule a precedent is the extent of reliance on the existing rule. See *Casey*, 505 U. S., at 855-856. It is sometimes said that the reliance interest is not strong in cases involving procedural rules, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), but that is not universally true. Certainly, criminal defendants have very little reliance interest in rules which favor them, because of their unique privilege against appeal under the Double Jeopardy Clause. A defendant who successfully relies on a favorable procedural rule is acquitted, or, in the penalty phase, escapes the death penalty, and that judgment can never be reversed, no matter how patently erroneous it may later be seen to be. See *Rumsey*, 467 U. S., at 212.

Quite the opposite is true for the prosecution. Under *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987) *every* new constitutional rule applies fully retroactively to *every* judgment not yet final on direct appeal, regardless of how faithfully the trial court followed then-controlling precedent at the time of trial. Even a practice defendant did not object to may be reversed as "plain error," even if it was plainly correct under the law existing at the time of trial. See *Johnson* v. *United States*, 520 U. S. 461, 468 (1997).

After *Furman* v. *Georgia*, 408 U. S. 238 (1972) the states had to change their laws and guess what procedures would pass constitutional muster. Those that guessed wrong had to change

them again after *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976). Still further changes were required by *Lockett* v. *Ohio*,438 U. S. 586, 604 (1978) (plurality opinion). Other new rules have not required legislation, but they have invalidated practices used in nearly every case in a state and previously considered perfectly acceptable. See, *e.g.*, *Mills* v. *Maryland*, 486 U. S. 367, 395 (1988) (Rehnquist, C. J., dissenting).

A new rule overturning a statewide practice is a disaster. In terms of dollars alone, the cost of trying and reviewing a capital case is much larger than a run-of-the-mill felony. Part of that cost is necessary, and part is generated by the unnecessarily complex and constantly changing law of capital sentencing. See G. Kanner, Hurdles Erected by Death Penalty Foes Haunt Underpaid Capital Case Counsel, L. A. Daily Journal, April 13, 1992, p. 6. But there are other costs that, although less tangible, are even more important.

When capital cases are overturned, the prosecution must choose between the financial and human expense of putting families and witnesses through another cycle of trial and review or, alternatively, letting a murderer among the most brutal get off with an inadequate, unjust sentence. Even if they decide to go forward, the staleness of the case may result in a life sentence where death was truly warranted.

That is not all. A major reason for capital punishment is deterrence. The existence of a deterrent effect has always been debated, but a flurry of recent studies confirm what common sense has long told us: the death penalty will have some deterrent effect if it is actually enforced. See Cloninger & Marchesini, Execution and deterrence: a quasi-controlled group experiment, 33 Applied Econ. 569 (2001); Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data, Emory University Working Paper 01-01 (January 2001), <http://userwww.service.emory.edu/~cozden/Dezhbakhsh_01_01_paper.pdf>; Mocan & Gittings, Pardons, Executions and Homicide, NBER Working Paper No. w8639 (December 2001),

<http://www.nber.org/papers/w8639>. For a less sophisticated but more easily understood study, see Tucker, Capital Punishment Works, The Weekly Standard at page 27 (Aug. 13, 2001).

The Cloninger and Marchesini article is particularly revealing for its indication of the impact of legal turmoil affecting all cases in a state. *Ex parte Davis*, 947 S. W. 2d 216 (Tex. Crim. App. 1996) created a de facto moratorium in Texas lasting about a year. 33 Applied Econ., at 569-570. The authors estimate that the lost deterrent effect killed over 200 people. See *id.*, at 575.

Turmoil in this important area of the law has a high cost in dollars, but it has an even higher cost beyond monetary measure. If the change being proposed were necessary to correct some monstrous evil, it might be debatable whether the cost was justified. Underlying *Furman* was the well-founded fear that the death penalty was being administered discriminatorily against black defendants. See *Graham* v. *Collins*, 506 U. S. 461, 479-481 (1993) (Thomas, J., concurring). No such issue is presented here. *Proffitt* v. *Florida*, 428 U. S., at 252, long ago rejected the claim that judge sentencing would be more arbitrary. The State of Nebraska, a state with judge sentencing, recently commissioned a study and, surprisingly, named the well-known anti-death-penalty partisan Dr. David Baldus[7] to lead it. Even so, the study concluded, "There is no significant evidence of the disparate treatment of defendants based on the race of the defendant or the race of the victim." D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999); A Legal and Empirical Analysis; Executive Summary 14 (2001), <http://www.nol.org/home/crimecom/homicide/execsum.pdf> (capitalization normalized). Change would also be warranted to prevent the execution of

7. See *McCleskey* v. *Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984), aff'd in part, 753 F. 2d 877 (CA11 1985), aff'd, 481 U. S. 279 (1987) (noting "partisan bias" of the witnesses, including Baldus).

innocent people, but the change proposed here has nothing whatever to do with the accuracy of the guilt determination.[8]

Twenty-six years ago, this Court reviewed a system where the trial judge made the finding of the death-eligibility circumstance, with a jury that was merely advisory and gave its advice by a simple majority vote. If there were a Sixth Amendment problem with that system, it would have been obvious at the time. If this Court had said so, Florida and the other court-sentencing states could have changed their laws then. Instead, they relied on this Court's repeated and unambiguous holdings to the contrary. The State of Colorado relied on these holdings to switch to court sentencing. See Colo. Stat. § 16-11-103(2)(a) (three-judge panel finds aggravating circumstances).

Congress itself relied on the holding that eligibility circumstances are not "elements" when it enacted the federal death penalty law in 1994. Although it provided for a unanimous jury finding beyond a reasonable doubt as a matter of policy, see 18 U. S. C. § 3593(c), (d), it did not require the factors to be specified in the indictment. See 18 U. S. C. § 3593(a) (notice by the government). If these factors were elements, this would be unconstitutional. See *Almendarez-Torres*, 523 U. S., at 228; *United States* v. *Allen*, 247 F. 3d 741, 763-764 (CA8 2001), cert. pending, No. 01-7310 (rejecting *Apprendi*/Indictment Clause attack on federal death penalty, citing *Walton*).

If defendant's argument is accepted, it means a new sentencing trial for *every* capital case not yet final in Arizona,

8. It is worth noting at this point that the common claim that nearly 100 former death-row inmates have been released after being "proven innocent" is bogus. The list includes such people as Jeremy Sheets, who was released because the principal witness against him is dead, see *State* v. *Sheets*, 260 Neb. 325, 332-333, 352, 618 N. W. 2d 117, 125, 137 (2000), and Jerry Bigelow, whose jury inexplicably acquitted him of murder despite finding true every element of the crime. See *Bigelow* v. *Superior Court*, 208 Cal. App. 3d 1127, 1129, 256 Cal. Rptr. 528, 529-530 (1989). These cases illustrate the extreme lengths our system goes to *favor* the defendant.

Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska and a new indictment, trial, and sentencing for *every* such case in the federal system. It means a huge cost in dollars wasted, years wasted, justice long delayed and probably denied, and the likely loss of innocent lives through diminished deterrence. And all for what? To correct a supposed "defect" in current procedure so far removed from fundamental fairness that it was not perceived in a quarter century of the most intense and demanding scrutiny that any legal procedure has ever been subjected to in the history of law. The benefit from this change, if any, does not remotely approach the cost.

C. Public Confidence.

In *Casey*, 505 U. S., at 861, the Court noted that in cases involving major national controversies there are additional reasons to adhere to precedent. Capital punishment is such a controversy, and the reasons discussed in *Casey* apply with full force.

1. Frequent overruling.

"There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith . . . . The legitimacy of the Court would fade with the frequency of its vacillation." *Id.*, at 866. For capital punishment, unlike abortion, this concern is not hypothetical. Cf. *ibid.* That point is at hand.

For over three decades now, the American people have trudged the switchback trail of capital punishment jurisprudence. In their quest for a real, enforced death penalty for the very worst murderers, they have been led first one direction, then the opposite, based on conflicting signals of what the Constitution is supposed to require.

Witherspoon v. *Illinois*, 391 U. S. 510 (1968) disapproved a widespread practice in jury selection which had been expressly approved by this Court in *Logan* v. *United States*, 144 U. S. 263, 298 (1892). See *Witherspoon*, *supra*, at 536-537 (Black, J., dissenting). This decision brought executions to a halt as states went about retrying cases tried in reliance on long-established precedent. The majority opinion mentioned *Logan* only in a footnote and inexplicably referred to the clear holding of that case as "dictum." *Id.*, at 523, n. 22.

The next major battle was discretionary sentencing. In *McGautha* v. *California*, 402 U. S. 183, 196 (1971), the Court addressed the claim "that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable." Justice Harlan, writing for the majority, traced the history of capital punishment and discretionary sentencing, *id.*, at 197-206, before reaching the conclusion. "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution." *Id.*, at 207 (emphasis added).

The sentencing method that had been perfectly valid in May of 1971 suddenly became unconstitutional 13 months later. *Furman* v. *Georgia*, 408 U. S. 238 (1972). For the second time in four years the existing sentences, tried in a manner this Court had expressly said was constitutional, were wiped out. Again, the people had to pick up the pieces and start over.

The process of starting over was infinitely complicated by the inability or unwillingness of the Justices in the *Furman* majority to agree on a single opinion. Legislatures across America were told that vitally important statutes were unconstitutional but not told why or how to fix them. They had to guess.

The National Association of Attorneys General formed a committee to try to cope with *Furman*. See *Rockwell* v. *Superior Court*, 18 Cal. 3d 420, 447, 556 P. 2d 1101, 1117 (1976) (Clark, J., concurring in the judgment). The consensus

of the nation's top prosecutors was that mandatory sentencing was needed to comply with *Furman* and that the states which had enacted "guided discretion" statutes were on shaky ground. *Ibid.*, 556 P. 2d, at 1117-1118.

This view was not limited to prosecutors. In 1976, the discretionary systems were attacked for being discretionary. See *Gregg* v. *Georgia*, 428 U. S. 153, 199 (1976) (lead opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 254 (1976) (lead opinion); *Jurek* v. *Texas*, 428 U. S. 262, 274 (1976) (lead opinion). The mandatory systems were attacked for being only "ostensibly" mandatory while actually "invit[ing] the exercise of sentencing discretion." Brief for Petitioners in *Woodson* v. *North Carolina*, O. T. 1975, No. 75-5491, pp. 18-19; Brief for Petitioner in *Roberts* v. *Louisiana*, O. T. 1975, No. 75-5844, p. 19 ("*de facto* sentencing discretion").

The "better" view turned out to be a wrong guess. Mandatory sentences were banned in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). In justifying this result, the *Woodson* lead opinion relied on *McGautha*, the very precedent so unceremoniously dumped in *Furman*. *Id.*, at 297. The lead opinion also relied on Chief Justice Burger's *dissent* in *Furman*, *ibid.*, and it noted without apology that the statutes it was striking down were enacted in an effort to comply with *Furman*. *Id.*, at 298.

Sweeping up the broken glass once again, the states endeavored to comply with what the Constitution "required" in 1976, as opposed to what it had "required" in 1972 or 1971. Unfortunately, cases tried in 1976 would later be reviewed to determine if they complied with what the Constitution would "require" in 1987.

Proffitt rejected the main attack on Florida's system, that it was unconstitutional "because it *allows* discretion to be exercised at each stage of a criminal proceeding . . . ." 428 U. S., at 254 (lead opinion) (emphasis added). *Proffitt* then went on to review the essential features of the Florida system and approve the system so described.

The Florida statute specified the mitigating factors. *Id.*, at 249, n. 6. There was no catch-all factor.

> "On their face these procedures . . . appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against *seven* mitigating factors to determine whether the death penalty shall be imposed." *Id.*, at 251 (emphasis added).

If that were not clear enough, the *Proffitt* Court modified its quotation of the Florida statute to insert "statutory" before "mitigating." *Id.*, at 250. Thus, the *Proffitt* Court understood the Florida system to weigh on the mitigating side a specified list of enumerated factors. If the lack of a "catch-all" factor was a constitutional defect, it was apparent on the face of the statute. Yet *Proffitt* did not see it as a defect. The Constitution did not require consideration of circumstances beyond the statutory list on July 2, 1976.

Twenty-nine days later, James Hitchcock strangled and murdered 13-year-old Cynthia Driggers. Hitchcock had molested her, and he killed her when she said she would tell. *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987). He was tried for that crime under the eminently reasonable belief that Florida law limited mitigating circumstances to the statutory list and that *Proffitt* had upheld that system.[9]

Lockett v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion) declared, out of the blue, a constitutional mandate to consider whatever factors the defendant may offer in mitigation. In an attempt to distinguish *Proffitt*, the plurality observed that *Proffitt* had noted that while the statute did not include a catch-all factor, it also did not expressly preclude nonstatutory mitigation as opposed to nonstatutory aggravation, which was

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9. The actual state of Florida law at that point was somewhat ambiguous, see *id.*, at 396-397, but that is not material to the point under discussion here. Hitchcock's trial judge understood the law to be as *Proffitt* understood it.

precluded. This, said *Lockett*, showed that *Proffitt* understood Florida to allow nonstatutory mitigation, ignoring the clear, contrary language in the body of the opinion, noted above. *Id.*, at 606, n. 15. The transparency of this evasion did not escape the Justices dissenting from *Lockett*'s new rule. *Id.*, at 629-630 (Rehnquist, J., dissenting); *id.*, at 623-624 (White, J., concurring in the judgment).

Eleven years after the crime, James Hitchcock's sentence was overturned because his trial judge committed the "error" of taking *Proffitt* at its word. Cynthia Driggers, dead at 13, would have been 24 by then. This Court cannot undo the damage done in the past by its repeated disapproval of previously approved practices. It can, however, refrain from causing such damage again.

"There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term." *Casey*, 505 U. S., at 866. Large segments of the American public have already justifiably concluded that the incessant disapproval of previously approved practices is the product of simple hostility to capital punishment rather than genuine application of principles really in the Constitution. The last thing the Court, the country, or the rule of law needs is yet another wholesale uprooting.

2. Intensely divisive controversy.

Furman v. *Georgia*, *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and the *Gregg* companion cases, taken together, represent one of the resolutions of an "intensely divisive controversy" of the sort discussed in *Casey*, 505 U. S., at 866. Those cases resolved that capital punishment could not continue in America as it had been, but that it would not be abolished by the judiciary. The cases further sketched the outline of what was allowable. Many subsidiary rules have

sprouted since then, a few of which we have discussed, but defendant in this case asks for something qualitatively different.

Defendant asks that a major structural feature of one of the systems approved in *Proffitt*, adopted in many states, and expressly upheld multiple times now be disapproved. The Court should not disapprove major features of the approved systems any more then it should go back and authorize the mandatory or unguided discretionary systems it previously disapproved. The broad outlines of *Gregg* and the companion cases represent a great compromise which neither side likes, but which has created at least a workable set of rules. Those who struggle to implement those rules are betrayed when the rules are suddenly changed. See *Casey*, *supra*, at 868. It would take an extraordinarily compelling need to justify such a betrayal, and no such need is present in this case.

"Finally, this Court has previously considered and rejected the argument that the principles guiding [*Apprendi*] render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." *Apprendi*, 530 U. S., at 496. Nothing has changed. That argument should be rejected again.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

March, 2002

Respectfully submitted,

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(9)

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In The

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari
To The Arizona Supreme Court

BRIEF OF *AMICI CURIAE* ARIZONA VOICE FOR CRIME VICTIMS, INC., NATIONAL CRIME VICTIM LAW INSTITUTE, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF *AMICI CURIAE* INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. This Court should continue the balance it has struck between its Eighth Amendment and Sixth Amendment jurisprudence in capital sentencings and, in cases such as this, where Arizona followed precisely the earlier rulings of this court to fashion a "constitutional" procedure for capital sentencings, should deny to the Petitioner the relief he seeks 6

II. If relief is granted to the Petitioner, this Court, consistent with its holding in *Teague v. Lane*, should be clear to apply any such holding prospectively only so as to not unnecessarily undermine the principles of due process, fairness, and finality for crime victims which are also core values of our criminal justice system 9

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) ..... *passim*

Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489 (1998) 2, 3

Dukes v. United States, 255 F.3d 912 (8th Cir. 2001) 10, 13

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1973) 8

Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) 8

Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000) 11, 13

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999) 7

Linkletter v. Walker, 381 U.S. 618 (1965) 15

Mackey v. United States, 401 U.S. 667 (1963) 12, 14

Morris v. Slappy, 103 S.Ct. 1610 (1983) 5

Ring v. Arizona, 200 Ariz. 267, 25 P.3d 1139 (2001) 4

State of Arizona v. Sepulveda, 201 Ariz. 158, 32 P.3d 1085 (2001) 11, 13

State v. Herrod, 200 Ariz. 309, 26 P.3d 492 (2001) 6

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Tyler v. Cain, 533 U.S. 656, 121 S.Ct. 2478 (2001) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Mandanici, 205 F.3d 519 (2d Cir. 2000) 12

United States v. Moss, 252 F.3d 993 (8th Cir. 2001) 10, 13

United States v. Sanders, 247 F.3d 139 (4th Cir. 2001) 10, 13

Walton v. Arizona, 497 U.S. 639 (1990) ..... *passim*

STATUTES

Pub. L. No. 104-132, 110 Stat. 1214 (1986) 15

CONSTITUTIONAL PROVISIONS

ALA. CONST. amend. 557 4

ALASKA CONST. art. I, § 24 4

ARIZ. CONST. art. II, § 2.1 ..... 4, 10, 16

ARIZ. CONST. art. II, § 2.1(A)(10) 3, 10

ARIZ. CONST. art. II, § 2.1(C) 10

ARIZ. CONST. art. II, § 11 ..... 3, 9

CAL. CONST. art. 1, § 28 4

COLO. CONST. art. II, § 16a 4

CONN. CONST. art. I, § 22 4

FLA. CONST. art. I, § 16b 4

IDAHO CONST. art. I, § 22 4

ILL. CONST. art. I, § 8.1 4

TABLE OF AUTHORITIES – Continued

Page

IND. CONST. art. I, § 13(b) 4

KAN. CONST. art. XV, § 15 4

LA. CONST. art. I, § 8.1 4

MD. CONST. art. XCVII 4

MICH. CONST. art. I, § 24 4

MISS. CONST. art. III, § 26A 4

MO. CONST. art. I, § 32 4

NEB. CONST. art. I, § 8(2) 4

N.J. CONST. art. I, § 22 4

N.M. Const. art. II, § 24 4

N.C. CONST. art. I, § 37 4

OHIO CONST. art. I, § 10a 4

OKLA. CONST. art. II, § 34 4

OR. CONST. art. I, § 43 4

R.I. CONST. art. I, § 23 4

S.C. CONST. art. I, § 24 4

TEX. CONST. art. I, § 20 4

UTAH CONST. art. I, § 28 4

VA. CONST. art. I, § 8A 4

WASH. CONST. art. I, § 35 4

WIS. CONST. art. I, § 9m 4

TABLE OF AUTHORITIES – Continued

Page

SCHOLARLY ARTICLES AND BOOKS

Donna Knudson, *Death Row Status Report Memorandum*, Arizona Department of Corrections Prison Operations Offender Service Bureau, March 15, 2002 3

John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld, *Probing Life Qualification Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, n. 57 (Summer 2001) 11

Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 361 (1993) 11

Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEOLJ 387, n. 341 (2002) 11

Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act*, 25 Am. J. Crim. L. 203, 216-219 (1998)..... 14, 15

STATEMENT OF *AMICI CURIAE* INTEREST

Arizona Voice for Crime Victims, Inc. (AVCV), works to ensure that Arizona crime victims' state constitutional rights to justice and due process throughout the criminal justice process are protected. To achieve this purpose, Arizona Voice for Crime Victims educates and empowers victims through legal advocacy as well as crisis response training and continuing legal education for the judiciary and law enforcement.

The vision of Arizona Voice for Crime Victims is to establish a compassionate justice system in which crime victims know how to seek immediate crisis intervention when they become victims of crime, are informed of their rights under the Arizona Constitution, fully understand those rights, know how to assert their rights and have a meaningful way to enforce them.

Consistent with this vision is the goal of assisting the judiciary in balancing the Sixth Amendment and Eighth Amendment rights of the accused with the crime victim's need for finality and deterrence. Because of the potentially catastrophic effect this case may have on a victim's right to finality, AVCV has a strong interest in the outcome of this case.

The National Crime Victim's Law Institute (NCVLI) is a non-profit educational organization dedicated to defending the dignity and legal rights of crime victims and promoting a fair and balanced criminal justice system through legal education, legal scholarship, legal information resources and legal advocacy. It operates a legal clinic protecting victims through legal action and

has a strong interest in defending victims' rights to finality.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

"Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing that the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and crime victims alike." *Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 1493, 1501 (1998) (citing *Herrera v. Collins*, 506 U.S. 390, 421, 113 S.Ct. 853, 871, 122 L.Ed.2d 203 (1993).

Leesa Johnson, the daughter of Timothy Ring's murder victim, John Magoch, has spent the last eight years of her young life waiting for justice. On November 28, 1994, Leesa's father was robbed and brutally murdered while he was working as a Wells Fargo armored van driver

[1] Arizona Voice for Crime Victims, Inc. and the National Crime Victim's Law Institute file this brief with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with this Court. Counsel for Arizona Voice for Crime Victims, Inc. and the National Crime Victim's Law Institute authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than Arizona Voice for Crime Victims, Inc., the National Crime Victim's Law Institute, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

servicing a Dillard's Department Store at Arrowhead Mall. John Magoch's killer was convicted by a jury of felony murder and was sentenced to death.[2] After years of appeals, Leesa Johnson finally was ready for "an assurance of real finality . . . (and to) . . . move forward knowing that the moral judgement (of the State) will be carried out."[3] – until now.

Now, if the Petitioner prevails, Leesa Johnson and hundreds of other family members of the nearly 200[4] additional Arizona homicide victims may, once again, be forced to return to court while the constitutional promise of finality[5] remains for them hollow and unfulfilled. This failure to secure "real finality" will not be because new evidence exonerating Timothy Stuart Ring has been found, but because a judge has followed precisely the Arizona Supreme Court and this Court's interpretation of the United States Constitution and found beyond a

[2] The trial judge filed the special verdict on October 29, 1997.

[3] *Calderon, supra* at 1493.

[4] *See* Donna Knudson, *Death Row Status Report Memorandum*, Arizona Department of Corrections Prison Operations Offender Service Bureau, March 15, 2002 stating that there are 129 inmates on Arizona's death row. Many are serving capital sentences for killing multiple victims.

[5] Article 2, § 2.1(A)(10) of the Arizona Constitution guarantees victims of crime the "right to speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Article 2, § 11 guarantees all Arizonans that "[j]ustice in all cases shall be administered openly, and without unnecessary delay."

reasonable doubt that the defendant's crime consisted of at least one aggravating factor.[6]

While *Ring v. Arizona*, 200 Ariz. 267, 25 P.3d 1139 (2001) provides this Honorable Court with the opportunity to clarify much of the constitutional chaos facing states authorizing capital sentencing that requires a judge, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death, it also provides this Court with the opportunity to address the important victims' rights that are at stake if this Court finds for the Petitioner.[7]

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[6] *See Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (1990) (upholding Arizona's sentencing scheme), *Ring v. Arizona*, 200 Ariz. 267, 25 P.3d 1139 (2001) (Arizona Supreme Court was bound by Supremacy Clause to follow determination in *Walton v. Arizona*, upholding the constitutionality under the Sixth Amendment of the capital statutory scheme).

[7] Over 32 states now have constitutional provisions protecting the rights of crime victims. *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. 1, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 22; FLA. CONST. art. I, § 16b; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 8.1; MD. CONST. art. XCVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 8(2); N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 20; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m. While victim's rights are not yet recognized by the United States Constitution, S. J. R. 3, ___ Cong., ___ Session (2002), the Crime Victim's Rights Amendment is currently pending in the United States Senate.

The price of abolishing Arizona's capital sentencing structure would be too high if only applied to Petitioner's case and prospectively. Such a decision would undo the constitutional balance that this Court has struck between the Sixth and Eighth Amendments and that the People of Arizona have ratified through their Legislature. However, if this Court were to apply an abolition of Arizona's capital sentencing structure retroactively, it would have a devastating effect on hundreds of innocent Arizona families – the loved ones of murder victims who must suffer through years of resentencing procedures waiting for justice to be done. In *Morris v. Slappy*, 103 S.Ct. 1610, 1618 (1983), this Honorable Court urged that "in the administration of justice the courts cannot ignore the interests of crime victims."[8]

The Court should consider the interests of crime victims if it holds for the Petitioner. Retroactive application of the holding sought by the Petitioner would require the reversal of death penalty final judgments and force hundreds of innocent victims to endure the uncertainty, pain, and hardship of future sentencing proceedings. The cost of applying such a holding retroactively would fall most heavily on victims by betraying the promise of finality and creating decades of unnecessary litigation. If this Court finds for the Petitioner, this Court ought not to permit the retroactive application of its holding.

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[8] *Walton*, 497 U.S. at 668 (Justice Scalia concurring).

ARGUMENT

I. This Court should continue the balance it has struck between its Eighth Amendment and Sixth Amendment jurisprudence in capital sentencings and, in cases such as this, where Arizona followed precisely the earlier rulings of this court to fashion a "constitutional" procedure for capital sentencings, should deny to the Petitioner the relief he seeks.

"For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow." *Walton v. Arizona*, 497 U.S. 639, 668 (1990) (Justice Scalia, concurring). Once again, the Arizona capital sentencing structure is before this Honorable Court. Once again, the Petitioner, different in name only, argues that the Arizona capital sentencing structure requiring a judge to find specific aggravating and mitigating factors after a jury verdict finding a defendant guilty of a capital crime violates the Sixth Amendment.

The Respondent counters that, unlike the statutory scheme in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), the trial court's finding of aggravating circumstances does not increase the "statutory maximum" sentence under Arizona's capital sentencing scheme and thus is consistent with the Sixth Amendment. As described by the Respondent, under Arizona law, first degree murder is a capital offense. *State v. Herrod*, 200 Ariz. 309, 343, 26 P.3d 492 (2001). In fact, in *Apprendi*, this Honorable Court reaffirmed Arizona's capital sentencing structure:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990). . . . For reasons we have explained, the capital cases are not controlling:
>
> 'Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all *elements* of an offense which carries as its *maximum penalty*, the sentence of death, it may be left to the judge to decide whether the maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with the actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.' *Almendarez-Torres*, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (Scalia, J., dissenting) (emphasis added). See also *Jones v. United States*, 526 U.S. 227 at 250-251, 119 S.Ct. 1215 (1999).

530 U.S. at 496, 120 S.Ct. at 236 (2000).

Justice Scalia, in his *Walton* concurring opinion expressed the frustration that many feel at the state level:

> "Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing – effectively requiring capital sentencing proceedings separate from the adjudication of guilt, dictating the type and extent of discretion the

> sentencer must and must not have, requiring that certain categories of evidence must and must not be admitted, undertaking minute inquiries into the wording of jury instructions to ensure that jurors understand the duties under our labyrinthine code of rules, and prescribing the procedural forms and sentencing decisions [that] must follow.

497 U.S. 639 at 657 (citations omitted).

The State of Arizona has created a capital sentencing structure in an attempt to comply with this "rulemaking body." The intent of the current sentencing structure is to comply with the varying rules demanded by this Court's jurisprudence by creating a judge sentencing system that can account for the myriad array of judicial rules regarding aggravating and mitigating factors.[9]

Much of the confusion started after *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1973) when this Court began developing Eighth Amendment jurisprudence by constraining a sentencer's discretion within certain specific standards so that the death penalty was not inflicted "randomly and capriciously."

In *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909 (1976), this Court continued to regulate and rein in the discretion of jurors – " . . . discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[10] In order to comply, Arizona, like

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[9] *See Walton*, 497 U.S. 639, 656-674 (Justice Scalia's concurring opinion discussing this Court's death penalty jurisprudence).

[10] *Id.* at 189, 96 S.Ct. at 2932.

many other states, adopted sentencing procedures that eliminated some of the capital sentencing discretion previously permitted.

Arizona provided the procedural protections described by the Respondent. Now, the Petitioner is arguing that such procedural protections, designed to eliminate the "infrequency and seeming randomness" of the discretionary state systems, constitutes a violation of the Sixth Amendment.[11]

Arizona's capital sentencing structure has been upheld by this Court on both Sixth and Eighth Amendment grounds. *Walton v. State of Arizona*, 497 U.S. 639, 656, 110 S.Ct. 3047 (1990). We urge this Court to reaffirm the constitutionality of Arizona's capital sentencing structure which has struck a fair balance between the Sixth and Eighth Amendments of the United States Constitution.

II. If relief is granted to the Petitioner, this Court, consistent with its holding in *Teague v. Lane*, should be clear to apply any such holding prospectively only so as to not unnecessarily undermine the principles of due process, fairness, and finality for crime victims which are also core values of our criminal justice system

Finality is a core value of Arizona's criminal justice system. Since statehood Arizona's Constitution has promised to its citizens "Justice in all cases shall be administered openly, and without unnecessary delay."[12] More

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[11] *See Walton*, 497 U.S. 658 (Scalia discussing the Eighth Amendment jurisprudence of Justices Stewart and White).

[12] ARIZ. CONST., art. II, § 11.

recently, the people of Arizona amended their constitution to reaffirm explicitly this promise of finality for crime victims.[13] In Arizona's Victim's Bill of Rights, crime victims, including the direct family members of murder victims[14] are afforded the right to a "speedy trial or disposition and prompt and final conclusion of the case after conviction and sentence."[15]

If relief is granted to the Petitioner, this Court, in the interest of preserving the due process, fairness and finality rights that Arizona has promised to its crime victims, should honor the good faith attempt of the State of Arizona to comply with both the Sixth and Eighth Amendment jurisprudence of this Court and consider any abolition of Arizona's current sentencing structure to be a new rule to be applied prospectively only, consistent with this Court's decision in *Teague* and with the majority of Circuit Court decisions addressing the *Apprendi* retroactivity issue.[16] "In our view, the question 'whether a

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[13] At the November 6, 1990 General Election the voters passed Proposition 104 adding Article II, § 2.1, providing for a Victim's Bill of Rights. The Victim's Bill of Rights became effective on November 26, 1990, when the election results were proclaimed by the Governor.

[14] ARIZ. CONST. art. II, § 2.1(C) provides, " 'Victim' means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child, or other lawful representative, except if the person is in custody for an offense or is the accused."

[15] ARIZ. CONST., art. II, § 2.1(A)(10).

[16] *See United States v. Moss*, 252 F.3d 9[illegible] (8th Cir. 2001) (*Apprendi* not a watershed rule that seriously diminishes fairness of trial); *Dukes v. United States*, 255 F.3d 912 (8th Cir. 2001) (following *Moss*); *United States v. Sanders*, 247 F.3d 139, 151

decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision.' " *Teague v. Lane*, 489 U.S. 288 at 300 (1989) (quoting Mishkin, Foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 64 (1965)).

Sentencing structures, similar to Arizona's,[17] have been in place for decades and hundreds of offenders have been sentenced under such structures.[18] If this Court strikes down these capital sentencing laws, but remains silent on the question of retroactivity, it surely will be argued that the Court's holding ought to apply retroactively and that every death sentence under such a law

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(4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (under *Teague*, *Apprendi* is not retroactive to issue involving the discrepancy between information and jury instructions). The Arizona Supreme Court has also addressed *Apprendi* retroactivity in *State of Arizona v. Sepulveda*, 201 Ariz. 158, 32 P.3d 1085 (2001) (*Apprendi* is not the type of watershed rule of criminal procedure that implicates fundamental fairness of the trial and that must be accorded retroactivity).

[17] Arizona, Colorado, Idaho, Montana, Nebraska, Alabama, Delaware, Florida and Indiana all have some form of judge sentencing. *See* John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld, *Probing Life Qualification Through Expanded Voir Dire*, 29 Hofstra L. Rev. 1209, n. 57 (Summer 2001).

[18] *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEOLJ 387, n. 341 (2002) ("The reasons for the rule of nonretroactivity include judicial efficiency, the psychological value of finality, and the value of comity between the state and federal courts," citing *Teague v. Lane*, 489 U.S. 288, 308 (1989) and Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 361 (1993).

should be overturned and a new sentencing proceeding ordered.

Customarily, a newly created or newly adopted rule of constitutional law cannot be applied retroactively to a judgment and sentence that is final unless the rule fits into one of two exceptions. *Teague v. Lane*, 489 U.S. 288 at 306 (1989). First, a prisoner whose conviction is final can invoke a new rule, if the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1963)). This generally applies to new rules making certain conduct exempt from the legislature's power to define criminal acts and is not implicated by *Apprendi*. *Id.*

The second exception requires the new rule to apply retroactively if it is a fundamental rule that ensures accuracy in the outcome of the trial. *Teague*, 498 U.S. at 313. This exception has been construed narrowly to facilitate the finality of criminal convictions, essential to the effective operation of the criminal justice system and its deterrent effect. *Id.* Since *Teague*, this Court has declined to apply retroactive relief to all habeas corpus cases involving legal claims except one, although this Court has reversed decisions based on factual claims. *United States v. Mandanici*, 205 F.3d 519, 529 (2d Cir. 2000) (identifying "at least eleven new rules" of criminal procedure announced since *Teague* that this Court has declined to apply the second *Teague* exception and are therefore not retroactive).

The Circuit Courts of Appeals addressing the *Apprendi* retroactivity issue have *uniformly* concluded that the

second exception does not apply finding that *Apprendi* is not a watershed rule that goes to the fundamental fairness of a proceeding.[19]

Furthermore, in a post-*Apprendi* decision, this Court stated, "It is unlikely that any of these watershed rules [satisfying the second *Teague* exception has] yet to emerge." *Tyler v. Cain*, 533 U.S. 656, ___ n. 7, 121 S.Ct. 2478, 2484 n. 7 (2001).

Apprendi, if applied to this case, clearly should not be applied retroactively under the second *Teague* exception. The evidence remains the same. Only the sentencer would change if this Court finds for the Petitioner and abolishes Arizona's capital sentencing structure. Such a modification does not invoke the narrowly interpreted exception.

Moreover, any retroactive application of a holding for Petitioner, would contravene important principles of finality that have underscored this court's criminal justice jurisprudence. While born as a minority opinion, Justice Harlan's opinion on the importance of finality now serves

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[19] *See United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (*Apprendi* not a watershed rule that seriously diminishes fairness of trial); *Dukes v. United States*, 255 F.3d 912 (8th Cir. 2001) (following *Moss*); *United States v. Sanders*, 247 F.3d 139, 151 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (under *Teague*, *Apprendi* is not retroactive to issue involving the discrepancy between information and jury instructions). The Arizona Supreme Court has also addressed *Apprendi* retroactivity in *State of Arizona v. Sepulveda*, 201 Ariz. 158, 32 P.3d 1085 (2001) (*Apprendi* is not the type of watershed rule of criminal procedure that implicates fundamental fairness of the trial and that must be accorded retroactivity).

as the foundation for much of this Court's jurisprudence on retroactivity.[20] Justice Harlan wrote, "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already *resolved*." *Mackey*, 401 U.S. at 691.

In Tung Yin's 1998 article on this Court's retroactivity jurisprudence, the author explains:

> The initial starting point for understanding *Teague* is Paul Bator's 1963 article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*. This article is cited in *Teague* just once, but its influence permeates the opinion, and in fact, much of the Court's habeas decisions in the post-Chief Justice Warren era.
>
> Professor Bator's thesis was that relitigation of factual matters such as guilt could not be justified solely due to the possibility of a mistake in the previous round of litigation, as the ubiquitous possibility of error would justify endless relitigation. Relitigation of guilt imposes severe costs on society, by using "intellectual, moral, and political resources involved in the legal system," subverting "a judge's sense of responsibility," weakening "the educational and deterrent functions of criminal law," and retarding the rehabilitation of criminal defendants by

[20] *See* Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Peanlty Act*, 25 Am. J. Crim. L. 203, 208 n. 74 quoting *Mackey*, 401 U.S. at 691.

> offering the endless hope of escape from punishment.[21]

25 Am. J. Crim. L. 203, 216-219 (1998).

That finality has become a bedrock principle of this Court's criminal justice jurisprudence and is unequivocally established in *Teague*. This Court wrote that the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principal of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."[22] This Court should not now abandon these bedrock principles but instead take this opportunity to reaffirm them even as the Congress has reaffirmed them on behalf of the American people in the Antiterrorism and Effective Death Penalty Act of 1996.[23] Finally, in deciding whether to apply a rule retroactively, this Court should also look to the core values established in Arizona's criminal justice system. If applying the case retroactively would undermine a core value of that system, it should only do so when there is an express constitutional command. "The Constitution neither prohibits nor requires retrospective effect."[24]

[21] Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act*, 25 Am. J. Crim. L. 203, 216-219 (1998).

[22] Yin at 239 quoting *Teague*, 489 U.S. 288, 309 (1989).

[23] Pub. L. No. 104-132, 110 Stat. 1214 (1986).

[24] *Linkletter v. Walker*, 381 U.S. 618, 619-620 (1965).

Finality is a core value of the Arizona criminal justice system.[25] This Honorable Court should preserve this value unless to do so would contravene a fundamental and express constitutional command. Nothing in the Constitution or in this Court's retroactivity jurisprudence requires such a result.

CONCLUSION

To preserve and protect victims' rights to justice, due process, and finality, the decision of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

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[25] ARIZ. CONST. art. II, § 2.1(10) guaranteeing crime victims " . . . a speedy trial or disposition and a prompt and final conclusion of the case after the conviction and sentence."